Petition

81-638

No.

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In the Supreme Court of the United States

October Term, 1981

LOWELL D. HEWITT, Superintendent; B. B. KYLER, C. O. III; R. E. STOTELMYER, Major; B. K. SMITH, Counselor III; K. R. HILEMAN, Farm Manager; D. R. ERHARD, Deputy Superintendent for Treatment; T. W. HENRY, Director of Treatment; W. W. MATEER, C. I. Manager; SCI-HUNTINGDON,

Petitioners

v.

AARON HELMS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is an inmate of a correctional institution, who is transferred from the general prison population to administrative segregation for non-disciplinary reasons pending the completion of an investigation of his involvement in a prison disturbance, entitled to the same procedural protections as the Court sanctioned for deprivations of statutory "good time" credits in *Wolff v. McDonnell*, 418 U.S. 538 (1974)?

2. Is the Court's summary affirmance in *Enomoto v. Wright*, 434 U.S. 1052 (1978), of controlling precedential value on the issue of what process is due an inmate of a correctional institution who is transferred from the general prison population to administrative segregation for non-disciplinary reasons pending the completion of an investigation of his involvement in a prison disturbance?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

LOWELL D. HEWITT, Superintendent; B. B. KYLER, C. O. III; R. E. STOTELMYER, Major; B. K. SMITH, Counselor III; K. R. HILEMAN, Farm Manager; D. R. ERHARD, Deputy Superintendent for Treatment; T. W. HENRY, Director of Treatment; W. W. MATEER, C. I. Manager; SCI-HUNTINGDON,

Petitioners

v.

AARON HELMS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Lowell D. Hewitt, B. B. Kyler, R. E. Stotelmyer, B. K. Smith, K. R. Hileman, D. R. Erhard, T. W. Henry, and W. W. Mateer, hereby petition that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit entered in this case on June 30, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals of June 30, 1981, has not been published but is printed in the Appendix, pp. 1a-34a. The opinion of the United States District Court for the Middle District of Pennsylvania is not reported but is printed in the Appendix, pp. 37a-45a.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Third Circuit was issued on June 30, 1981. This petition for a writ of certiorari was filed within ninety days of that date. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, §1.

STATUTE INVOLVED

The Civil Rights Act of 1871, c.22, §1 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1983.

STATEMENT OF THE CASE

On December 3, 1978, the plaintiff-respondent was an inmate who had been remanded to the custody of the Pennsylvania Bureau of Correction and who was incarcerated at the State Correctional Institution at Huntingdon, Pennsylvania. On that date, a general disturbance occurred at the institution in which several guards were injured. The prisoners in general population status were confined to their cells until the next day. Respondent was removed from general population on December 3, 1978, and transferred to administrative segregation.

Respondent received an institutional misconduct report on December 4, 1978, charging him with assault and disruption of institutional routine. An institutional hearing committee, convened on December 8, 1978, decided to continue respondent's hearing and to retain him in administrative segregation. Eight days after transfer to administrative segregation, the Commonwealth of Pennsylvania instituted a criminal prosecution against the respondent for assault and riot.

On January 2, 1979, the respondent appeared before the institutional Program Review Committee. After review of the circumstances, the Program Review Committee voted to continue the respondent in administrative segregation pending the completion of the criminal investigation by the Commonwealth. The preliminary hearing on the criminal charges took place on January 10, 1979, at which time the criminal proceedings were continued.

On January 19, 1979, the respondent received an institutional misconduct report charging him with striking a correctional officer. An institutional hearing committee, convened on January 22, 1979, found the respondent guilty of striking the officer and levied six months' confinement in disciplinary custody, effective December 3, 1978, as the disciplinary sanction. The Commonwealth of Pennsylvania dismissed the criminal charges at the preliminary hearing on February 6, 1979. Respondent was paroled from the Bureau of Correction on February 20, 1980.

This suit was instituted on July 26, 1979, in the United States District Court for the Middle District of Pennsylvania. The complaint was filed pursuant to 42 U.S.C. §1983, invoking the jurisdiction of the District Court pursuant to 28 U.S.C. §1331 and §1343, and alleging a violation of respondent's Fourteenth Amendment right to due process of law. The relief sought included a declaratory judgment, an injunction to enjoin the petitioners from continuing respondent in segregated housing, a reversal and expungement of respondent's institutional misconduct, damages, costs and attorney's fees.

By memorandum and order dated August 15, 1980, the District Court denied respondent's motion for summary judgment, granted petitioners' cross-motion for summary judgment, and entered judgment in favor of the petitioners. The Court held that no interest protected by the Fourteenth Amendment was implicated by respondent's confinement in administrative segregation, that the petitioners had complied with State regulations in dealing with respondent's involvement in the December 3, 1978 disturbance, and that the institutional hearing committee's

reliance upon information obtained from a confidential informant was not improper.

On June 30, 1981, the Court of Appeals for the Third Circuit reversed the judgment of the District Court and remanded the cause for further proceedings. The Court of Appeals held that the regulations of the Pennsylvania Bureau of Correction conferred to an inmate a liberty interest in freedom from transfer to administrative segregation and that upon transfer due process protections must be afforded.

Relying in large part upon this Court's summary affirmance in *Enomoto v. Wright*, 434 U.S. 1052 (1978), the Court of Appeals further held that the procedures to be employed when an inmate is transferred for nondisciplinary reasons are the same procedures prescribed by this Court for deprivations of statutory "good time" credits in *Wolff v. McDonnell*, 418 U.S. 539 (1974). The Court noted that the effect of its holding is to declare that respondent was denied due process unless he was afforded a *Wolff* pre-transfer hearing, or a hearing within a reasonable time after transfer, which was to determine whether he represented the type of risk which warranted administrative segregation. Finally, the Court held that respondent was denied due process by the petitioners' reliance upon the account of the confidential informant at the January 22, 1979, misconduct hearing.

Petitioners seek a writ of certiorari for this Court to review the opinion of the Third Circuit Court of Appeals holding that respondent was denied due process unless he was afforded the procedural protections of *Wolff v. McDonnell, supra.*

REASONS FOR GRANTING THE WRIT

I. The Opinion of the Circuit Court Is in Conflict With Opinions by Other Circuit Courts and Raises the Substantial Question of the Implication of This Court's Summary Affirmance in Enomoto v. Wright, 434 U.S. 1052 (1978)

The Court below held that regulations of the Pennsylvania Bureau of Correction conferred to an inmate a liberty interest in freedom from transfer to administrative segregation from the general inmate population for non-disciplinary reasons and that due process protections must be afforded the inmate upon such transfer. Moreover, it held that the procedures to be followed in such non-disciplinary transfers are the same procedures prescribed by this Court for deprivations of statutory "good time" credits and disciplinary transfers in *Wolff v. McDonnell*, 418 U.S. 539 (1974) (25a). The holding that the same procedures are to be afforded to inmates in both situations conflicts directly and in principle with opinions of other Circuit Courts.[1]

In *Daigle v. Hall*, 564 F.2d 884 (1st Cir. 1977), the Court held that Massachusetts prison regulations, which are analogous to the Pennsylvania regulations at issue below, did not create a liberty interest in freedom from

[1] The Second and Fifth Circuits are in accord with the decision of the Court below. *Raffone v. Robinson*, 607 F.2d 1058 (2nd Cir. 1979); *Parker v. Cook*, 642 F.2d 865 (5th Cir. 1981).

transfer to administrative segregation and, therefore, that due process protections did not attach. The Court of Appeals for the Seventh Circuit in *Bono v. Saxbe*, 620 F.2d 609 (7th Cir. 1980), held that transfer to administrative segregation requires procedural protections in addition to those prescribed in *Wolff v. McDonnell, supra.* In *Cummings v. Roberts*, 628 F.2d 1065 (8th Cir. 1980), the Eighth Circuit upheld a grant of summary judgment in a case where an inmate was transferred to administrative segregation without notice and hearing, on the authority of this Court's instruction in *Bell v. Wolfish*, 441 U.S. 520, 547 (1979), that prison officials must be free to take appropriate action to ensure the safety of others.

Finally, the Sixth Circuit has sanctioned a hybrid approach to the requisite procedural protections. In *Bills v. Henderson*, 631 F.2d 1287 (6th Cir. 1980), the Court held that the inmate who is transferred to administrative segregation is entitled to specific notice, a hearing, and a post-hearing, written, general statement of the reasons for transfer, but not a statement of the evidence relied upon. *Id.* at 1296.

The Third Circuit decision below placed considerable reliance upon this Court's disposition of *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal.), *aff. mem.*, 434 U.S. 1052 (1978). The Court cited *Wright v. Enomoto* as controlling Supreme Court law for the holding that the same procedures are to be afforded non-disciplinary and disciplinary inmate transferees (25a). All the above-mentioned Circuit Court decisions, with the exception of the Eighth Circuit in *Cummings v. Roberts*, relied in whole or in part upon this Court's summary affirmance of *Wright v. Enomoto.* The validity of this reliance, how-

ever, is severely tested by this Court's instructions that a summary affirmance, particularly on constitutional questions is not of controlling precedential value, *Edelman v. Jordan,* 415 U.S. 651, 671 (1974), that the rationale of a summary affirmance may not be gleaned solely from the opinion below, *Mandel v. Bradley,* 432 U.S. 173, 176 (1977), and that a summary disposition affirms only the particular judgment sought to be reviewed, *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 183 (1979).

That confusion among the Circuits has developed because of the summary affirmance in *Enomoto v. Wright* is apparent. The conflict among the Circuits can be resolved, and the implications of the summary affirmance can be clarified, by granting this petition and issuing the writ of certiorari.

II. The Question of What Process Is Due an Inmate Who Is Transferred From the General Prison Population to Administrative Segregation for Non-Disciplinary Reasons Is One of Extreme Importance to the Safe and Efficient Administration of Correctional Institutions

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The Court below held that the respondent was denied his right to due process upon transfer to administrative segregation pending investigation of criminal conduct, unless he was afforded the same procedural protections which were established for deprivations of statutory "good time" credits in *Wolff v. McDonnell,* 418 U.S. 539 (1974). As this Court has instructed, due process is a flexible concept, and what exactly constitutes due process

depends on the nature of the liberty interest and the surrounding circumstances. *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961).

The surrounding circumstances of a decision to remove an inmate from the general population involve considerations of internal security and order within correctional facilities, considerations which are peculiarly within the province and expertise of prison officials. *Bell v. Wolfish, supra,* 441 U.S. at 548. Because incarceration necessitates the limitation of inmates' retained constitutional rights and because there is no constitutional requirement that all inmate groups be treated alike, *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119 (1977), the Pennsylvania regulations draw a distinction between disciplinary and administrative transfers. A disciplinary transfer is conditioned upon the occurrence of a specified event; an administrative transfer is based upon correctional and administrative criteria involving informed predictions as to what would best serve institutional security or the safety and welfare of the inmates and staff. *Meachum v. Fano,* 427 U.S. 215 (1976).

The opinion below not only affects the interests of the parties, but also the interests of all prisoners and corrections officials alike within the jurisdiction of the Third Circuit. Prison officials must be free to take the appropriate actions to insure the safety of all persons residing and working within correctional facilities, as well as to guarantee to the community at large that the prisons will operate in an orderly manner. *Bell v. Wolfish, supra,* 441 U.S. at 547. Every state action that carries perceived adverse consequences for inmates cannot be regarded as activating a right to extensive procedural protections.

Moody v. Daggett, 429 U.S. 78 (1976). Moreover, the Court has admonished the lower courts to avoid entanglement with the operation of correctional institutions. *Bell v. Wolfish, supra.*

The important issue of the tension between inmates' rights to due process and prison officials' duty to administer institutions safely and efficiently can be resolved by reviewing the decision of the Third Circuit Court of Appeals in this case.

CONCLUSION

For the above-stated reasons, the petitioners respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 80-2393

HELMS, Aaron,

Appellant

v.

HEWITT, Lowell D., Supt; KYLER, B.B., CO III; STOTELMYER, R.E., Major; SMITH, B.K., Counselor III; HILEMAN, K.R., Farm Manager; ERHARD, D.R., Deputy Supt. for Treatment; HENRY, T.W., Director of Treatment; MATEER, W.W., C.I. Manager

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On Appeal From the United States District Court for the Middle District of Pennsylvania

(D.C. Civil No. 79-0950)

Argued February 26, 1981

Before: GARTH, ROSENN, *Circuit Judges,* and MILLER, *Judge**

(Opinion Filed June 30, 1981)

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* The Honorable Jack R. Miller, Judge, United States Court of Customs and Patent Appeals, sitting by designation.

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OPINION OF THE COURT

ROSENN, *Circuit Judge*

In this appeal we are asked to adjust the tensions between the necessity for efficient and orderly administration of state prisons on the one hand and the protection of important constitutional interests of their inmates on the other. The plaintiff, Aaron Helms, filed this action in the United States District Court for the Middle District of Pennsylvania under 42 U.S.C. §1983 (1976) requesting damages and injunctive and declaratory relief against certain officials of the State Correctional Institution at Huntingdon, Pennsylvania ("SCI Huntingdon"). He claims that he was placed in a restrictive custody status for 51 days without being afforded the procedural safeguards established by the state regulations or required by due process. He also asserts that the adjudication of institutional charges against him was constitutionally tainted by the substantive use of critical hearsay testimony

relating information allegedly obtained from an unidentified informant. The defendants were granted summary judgment by the district court, and plaintiff appealed pursuant to 28 U.S.C. §1291 (1976). We reverse.

I.

On December 3, 1978, a general disturbance occurred at SCI Huntingdon in which several guards were injured. With the assistance of state and local police the prison staff quelled the disturbance that same evening. The prisoners in general population were confined to their cells until the next day, when the prison returned to normality. Plaintiff Helms was removed from his general population cell at approximately 10:00 p.m. on December 3, interviewed by the state police, and placed in restrictive custody.[1]

On December 4, 1978, Helms was given a copy of Misconduct Report Number 90908, which charged him with assaulting corrections officers and disrupting normal institutional routine during the previous evening. On December 8, 1978, Helms appeared before an institutional Hearing Committee ("HC"), and administrative panel charged with adjudicating misconducts. 37 Pa. Code §95.-

[1] The Pennsylvania Bureau of Correction has established four classes of restrictive custody that are relevant to this case. These are, from least restrictive to most restrictive: Close Administrative, Close Disciplinary, Maximum Administrative, and Maximum Disciplinary, 37 Pa. Code §95.107. The criteria for confinement in and Administrative Custody classification will be discussed in detail *infra*. Confinement in Disciplinary Custody is reserved for those inmates that have been convicted on misconduct charges. 37 Pa. Code §95.106(2). It is definitional, then, that Helms was in Administrative Custody from December 3, 1978, to January 22, 1979, when he was found guilty of committing a misconduct.

103(c).[2] The Hearing Committee Report indicates that no determination concerning Helms' guilt was made at that time "due to insufficient information." The report also directs that Helms "[c]ontinue in Restrictive Housing Unit, Investigation under the provisions of Administrative Directive 004." The directive to which the report refers establishes procedures to be employed when inmate conduct violates not only institutional regulations but also the state penal code. This proffered authority for continuing Helms in restrictive custody status deals with situations in which the state police have been called in for investigative assistance. It reads, in pertinent part:

> IV. PROCEDURE WHEN STATE POLICE NOTIFIED
>
> A. . . .
>
> B. Pending arrival of the State Police, the institutional representative shall:
>
> 1. Place all suspects and resident witnesses or complainants in such custody, protective or otherwise, as may be necessary to maintain security. A hearing complying with BC-ADM 801 [37 Pa. Code §95.-103[3]] will be carried out after the investigation period. Such hearing shall be held within four (4) days unless the investigation warrants delay and in that case as soon as possible.

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[2] The December 8, 1978, HC was composed of three prison officials who are not named as defendants in this action.

[3] This section provides the general framework to be used in dealing with inmate misconduct. It requires that Misconduct Reports be filed in the event of serious rules violations, providing further that the inmate who is the subject of the Misconduct Report must be given a copy of the report as soon as possible (within three hours if placed in prehearing confinement). The rule

BC-ADM 004 at IV(B) (1) (Bureau of Correction Administrative Directive, *issued* Nov. 15, 1972, *amended* Aug. 5, 1975). As we have observed, the state police had interviewed Helms on December 3, just prior to his confinement in restrictive custody. Because the police investigation was incomplete, the HC apparently believed that the section 95.103 hearing should be delayed.

Eight days after Helms was placed in restrictive custody, the Commonwealth filed criminal charges against him, charging him with assaulting Corrections Officer Rhodes and riot. On January 2, 1979, the plaintiff appeared before an institutional Program Review Committee (PRC) composed of defendants Erhard, Henry, and Mateer. Although a PRC may serve as an appellate forum for review of HC decisions, the January 2 body sat in its capacity as a status review agency. As such it was charged with evaluating the circumstances of inmates in restrictive custody and making recommendations on their future confinement. These status reviews were to be made at least weekly and were to involve a personal interview of the inmate every 30 days. 37 Pa. Code §95.-103(g). After reviewing Helms' circumstances, the PRC recommended that he remain in Administrative Custody. The PRC members indicated in affidavits to the district court that they adopted this course of action because they understood that a preliminary hearing on the state criminal charges was scheduled for the following day. Superintendent Lowell Hewitt, also named as a defendant in this ac-

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establishes the Hearing Committee whose function has been described in the text. Subsection (d)(1) of the rule directs that "[t]he inmate shall be informed in writing of the charge and given a specific date for a hearing, which shall be held not less than 24 hours after receipt of this notice but within six days."

tion, concurred in the PRC's recommendation to continue Helms in restrictive custody. The preliminary hearing on the state criminal charges took place on January 10 and the criminal proceedings were "continued." In the meantime, Helms had not been afforded the hearing provided for by state regulations on the misconduct charge.

On January 19, 1979, plaintiff was given a copy of another Misconduct Report (number 90986), charging him with striking Sgt. Phillips, a corrections officer at the facility, during the disturbance of December 3, 1978. This Misconduct Report had been prepared by Lt. Buddy Kyler, a defendant to this action, based on "information from confidential informants."

On January 22, 1979, an HC composed of defendants Stotelmyer, Smith, and Hileman convened a hearing on the latest misconduct charge. The only evidence presented in support of these charges was the testimony of Lt. Kyler, who related what he had allegedly been told by informants. For safety reasons, the alleged informants were not identified, either to the defendant or to the members of the HC. The HC found Helms guilty on these charges (No. 90986) and sentenced him to six months in Disciplinary Close Custody, effective December 3, 1978. The HC Report of January 22, 1979, also contains the following statement: "NOTE: This finding and disposition concludes action on misconduct No. 90908, heard Dec. 8, 1978 without conclusion."

The Commonwealth dropped the criminal charges against Helms on February 6, 1979.[4] He has, since the

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[4] Helms' complaint alleged that the charges were dropped on January 6, 1979, and that allegation was not denied initially. The defendants did amend their answer to deny the allegation,

events detailed above, been paroled from the correctional facility.

II.

Helms' complaint propounds three theories under which he alleges he was denied the protections of the Due Process Clause of the fourteenth amendment. First, he claims that the prison treatment he received from December 3, 1978, to January 22, 1979, did not comply with the procedures established by the Pennsylvania Bureau of Correction's regulations. The process mandated under state law, Helms claims, was the process that was "due" under the fourteenth amendment. Failure of state officials to afford him the process is thus alleged to be a denial of his federal constitutional rights.[5]

Second, plaintiff claims that the state's prison regulations created for him an expectancy or entitlement that he would not be placed in restrictive custody absent conduct on his part meeting specific criteria established by those regulations. This expectancy or entitlement, he asserts, rose to the level of a state-created liberty interest of which Helms could be deprived only by constitutionally mandated "due process of law." Under Helms' theory

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however, and fixed February 6, 1979, as the dismissal date in the affidavits accompanying their motion for summary judgment. Plaintiff's opposing affidavit did not dispute the February date and the district court therefore correctly used February 6, 1979, as the date of dismissal. Fed. R. Civ. P. 56(e).

[5] Because we resolve the issues in this case concerning Helms' prolonged administrative detention under the plaintiff's second theory, we do not reach the issue whether a failure of state officials to comply with state procedural regulations constitutes a deprivation of federal procedural due process.

such process includes a determination, within a reasonable period of time, whether his conduct met the regulatory criteria. Helms claims that the fifty-one days spent in restrictive custody prior to a hearing on the merits of his detention amounted to a denial of his state-created liberty interest without due process.

Finally, Helms shifts his attack from his prolonged administrative confinement to the procedural regularity of his eventual disciplinary hearing. He attacks the January 22, 1979, finding of guilt as resting on a hearsay account of uncorroborated information garnered from a single unidentified informant. He alleges that the HC heard no evidence of the informant's motive, credibility, or trustworthiness on which to base a reasoned evaluation of his information. Helms asserts that when information is presented in such a manner, it is so lacking in reliability that to predicate a finding of guilt and disciplinary sanctions on it contravenes principles of fundamental fairness implicit in the Due Process Clause.

Before answering plaintiff's complaint, defendants moved to dismiss it or, alternatively, for summary judgment. The motion was referred to a United States Magistrate who recommended that it be granted. Relying on *Meachum v. Fano,* 427 U.S. 215 (1976), *Montanye v. Haymes,* 427 U.S. 236 (1976), and *Hodges v. Klein,* 562 F.2d 276 (3d Cir. 1977), the magistrate concluded that transfer to Administrative Custody infringed no interest protected by the fourteenth admendment. He treated Helms' challenge to the use of information from an unidentified informant as an assertion of a right to confrontation and a right to counsel and summarily disposed of these contentions on the authority of *Wolff v. McDonnell,* 418 U.S. 539 (1974).

The district court declined to adopt the magistrate's recommendations and denied the defendants' motion without prejudice to renewal. In a memorandum opinion, it thoughtfully concluded that the magistrate had given *Meachum* and *Montanye* an overly-broad reading in light of the Supreme Court's action in *Enomoto v. Wright*, 434 U.S. 1052 (1978), *aff'g mem.* 462 F.Supp. 397 (N.D. Cal. 1976). Pretrial proceedings continued and, at the close of discovery, both parties moved for summary judgment. At that time, the district court granted the defendants' motion. We presently review that judgment.

III.

In the opinion announcing the grant of summary judgment in favor of the defendants, the district court addressed each of plaintiff's three theories of liability. First, the court held that no interest protected by the fourteenth amendment was implicated by Helms' confinement in Administrative Custody. Second, it concluded that the state officials had complied in all respects with state law in dealing with the plaintiff's alleged involvement in the December 3, 1978, incident. Third, the court reasoned that because Helms had no right to confront or cross-examine witnesses at his disciplinary hearing, the HC's reliance on information secured from an unidentified informant was not improper.

A. The Nature of the Interest at Stake

In granting defendants' motion for summary judgment, the district court reversed its earlier holding that "due process does require a hearing prior to the transfer of a prisoner from the general population to a confinement whose conditions are more onerous than those en-

countered in the general population, absent unusual circumstance. . . ." *Helms v. Hewitt,* Civ. No. 79-950, slip op. at 4 (M.D. Pa. November 9, 1979) (memorandum opinion denying defendants' motion to dismiss). That earlier holding had been based on statements in *Wright v. Enomoto,* 462 F.Supp. 397 (N.D. Cal. 1976), *aff'd mem.,* 434 U.S 1052 (1978), which may be read as holding that the Constitution of its own force recognizes a liberty interest on the part of inmates not to be "transferred from the general prison population to the grossly more onerous conditions of maximum security." 462 F. Supp. at 402. The district court retreated from this position, however, in light of the intervening Supreme Court decision in *Vitek v. Jones,* 445 U.S. 480 (1980), which, it believed, "limited [Wright] to its factual basis in California law." *Helms v. Hewitt,* Civ. No. 79-950, slip op. at 2 (M.D. Pa. August 15, 1980).

Because all of Helms' theories are predicated on violations of the Due Process Clause, the district court correctly focused its attention on whether a deprivation of "life, liberty, or property" had occurred. *See* U.S. Const. amend. XIV, §1. If the interest being infringed by the State is not of constitutional dimension, no process is due upon its deprivation. However, we believe the district court may have acted improvidently in retreating from its original position holding that such an interest existed. The Supreme Court's decision in *Vitek* necessitated a reexamination of the district court's initial analysis of *Wright* in this case. It may even fairly be read to contradict that analysis. However, as we demonstrate *infra,* it does not foreclose Helms' claims as a matter of law and, in fact, sets forth a clear mode of analysis to be employed in evaluating those claims.

We look first to the substance of Helms' claims to identify the interests he alleges were infringed. Helms does not contend that his initial segregation in Administrative Custody on the night of December 3, 1978, should have been preceded by due process. He concedes that it is established law in this circuit that prison authorities may, in exigent circumstances, place inmates in restrictive custody without affording prior notice and hearing. *Biagiarelli v. Sielaff*, 483 F.2d 508, 511 (3d Cir. 1973); *Gray v. Creamer*, 465 F.2d 179, 185 n.6 (3d Cir. 1972). Further, Helms' objection to his eventual confinement in Disciplinary Custody is narrow: the HC ultimately determined his guilt on the basis of a mere hearsay account of the uncorroborated story of an unidentified informant. The remainder of his due process claims challenge the legality of his continuous confinement in Administrative Custody between December 3, 1978, and January 22, 1979. He contends that the confinement deprived him of a "liberty interest" and that such deprivation should have been accompanied by procedural safeguards greater than those afforded by the December 8 HC proceeding and the January 2 PRC status review. Our task, then, is to determine (1) whether Helms' administrative segregation from December 3, 1978, to January 22, 1979, infringed a valid liberty interest, and (2) whether, as a result of the disciplinary proceedings conducted January 22, 1979, Helms was denied a protected liberty interest.

Recent Supreme Court decisions have indicated that inmates' liberty interests stem from two sources. The first is state law, under a theory comparable to the "entitlement" theory of property. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975) (public education); *Perry v. Sinderman*, 408 U.S. 593 (1972) (tenured employment); *Gold-*

berg v. Kelly, 397 U.S. 254 (1970) (welfare benefits). Under this theory, a prisoner's interest in his liberty gains constitutional protection when the State, by statute, rule, or regulation, provides that the liberty will not be infringed except upon the occurrence of specified events. Thus, that quantum, or "expectancy," of liberty that is embodied in a prisoner's "good-time credits"—which the State has granted and has indicated will not be removed unless the prisoner engages in serious misconduct—cannot be impaired without affording at least minimal due process. *Wolff v. McDonnell*, 418 U.S. 539 (1974). A similar analysis led to the requirement that due process attend the revocation of parole, *Morrissey v. Brewer*, 408 U.S. 471 (1972), or probation, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). *Vitek v. Jones*, 445 U.S. at 488.

The second source of liberty interests is less easily defined. At one time, a majority of the Supreme Court looked to the Constitution itself as a source of protected liberty interests. *Meachum v. Fano*, 427 U.S. 215, 224 (1976). An insistent minority, however, argued that liberty is a natural right of man, and that the Constitution serves only to limit the sovereign's power to intrude on that liberty. *Id.* at 230 (Stevens, J., dissenting). Recently, the Court appears to have moved in this direction, for it has returned to a more familiar test to ascertain whether a liberty interest exists: does the action of the state threaten to impose a "grievous loss" on the individual. *Vitek v. Jones*, 445 U.S. at 488, 491-94. *See Morrissey v. Brewer*, 408 U.S. at 481; *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Whatever their roots, the interests protected under this theory are seen to be of such fundamental im-

portance that the State need not expressly recognize—indeed, is precluded from denying—their existence for them to be cloaked with constitutional protection. Whether the Constitution serves as a positive grant of liberty, as suggested by the majority in *Meachum*, or whether the individual enjoys a natural right to liberty protected by the Constitution, as claimed by the *Meachum* minority, it is undisputed that the Constitution itself requires that due process accompany an attempt to infringe on certain important rights.

Because confinement in Disciplinary Custody involves a determination of guilt, the notion that due process must attend such confinement is readily accepted. The district court measured Helms' claim of due process deficiencies in his disciplinary hearing against the constitutional standards of *Wolff v. McDonnell*, 418 U.S. 539 (1974), thereby implicitly acknowledging that a protectable liberty interest was involved. Even the Supreme Court, in *Wolff* and especially in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), seemed almost to assume the implication of a liberty interest when an inmate is subject to disciplinary proceedings on allegations of "serious misconduct." *See Wolff v. McDonnell*, 418 U.S. at 571 n.19; *Baxter v. Palmigiano*, 425 U.S. at 323. *See also Haines v. Kerner*, 404 U.S. 519 (1972). As we show *infra*, Pennsylvania follows the norm in reserving Disciplinary Custody for inmates found guilty of serious misconduct and has therefore clearly created a liberty interest in its inmates not to be confined in Disciplinary Custody. Defendants concede as much in their brief and the State appears to have recognized its constitutional obligations by establishing an extensive procedural framework to be used in dispensing discipline. *See* 37 Pa. Code §95.103.

One tends to be less willing to recognize an inmate's liberty interest in avoiding administrative confinement, however, even though the conditions of administrative confinement are not substantially different than those experienced in disciplinary confinement. This reluctance stems from the observation that administrative confinement is often used to maintain control in a volatile environment—to quench sparks before they become flames. Indeed, it was such a precautionary measure that accounted for Helms' initial segregation. Some correctional officials may say that they should not be entangled in procedural maneuvers when, in their informed judgment, a dangerous situation requires segregation of a particular inmate. Keeping these legitimate concerns in mind, we proceed to an examination of the district court's conclusions on this issue and an analysis of the relevant law.

The district court's original conclusion that Helms had stated a cause of action concerning his administrative confinement rested on its reading of *Wright* to recognize a liberty interest, arising from the operation of the Constitution itself, in an inmate not to be transferred from the general population to more onerous confinement. The court reached its conclusion after finding that segregation of an inmate in Administrative Custody constitutes a " 'severe impairment of the residuum of liberty which he retains as a prisoner.' " *Id.* at 3 (quoting *Wright v. Enomoto*, 462 F.Supp. at 402, *aff'd mem.*, 434 U.S. 1052 (1978)). As we have noted above, *see supra* at 8 & 9, the court later retreated on this point.

We agree with the district court that *Vitek* cast substantial doubt on the earlier holding that prisoners have an interest of purely constitutional origin in avoiding confinement in Administrative Custody. However, the dis-

trict court opinion gives no indication that the court looked to Pennsylvania law to determine whether a liberty interest arose from that source. We believe that such an examination was imperative under *Vitek*.

In *Wright v. Enomoto,* 462 F.Supp. 397 (N.D. Cal. 1976), a three-judge district court ruled that due process should have been afforded California inmates who were transferred, for administrative reasons,[6] from the general prison population to a maximum security unit within the same facility. That decision was summarily affirmed by the United States Supreme Court. 434 U.S. 1052 (1978). As noted earlier, it was this decision that first prompted the district court in the instant case to deny the defendants' motion to dismiss and to hold that due process protections were required before Helms could be detained in restrictive custody.

The *Wright* court held that California inmates had a constitutionally protected liberty interest not to be placed in maximum security absent collision with institutional standards. The court found the interest to be created by a state regulation which provided:

> Inmates must be segregated from others when it is reasonably believed that they are a menace to themselves and others or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative rea-

[6] The plaintiffs had been confined in maximum security for a variety of reasons, including "becoming too militant . . . spending too much time in the yard by [themselves]," 462 F. Supp. at 400, being " 'an influencial [sic] member of the Mexican Prison Community' [and] 'having leadership qualities,' " *id.* at 401, and being "suspected of being a leader in Nuestra Familia," *id.*

> sons. The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken.

462 F.Supp. at 403 (emphasis deleted). The court held that fixing conditions for segregation of inmates created a protectable liberty interest that warranted the protections enumerated in *Wolff v. McDonnell*, 418 U.S. 539 (1974). These procedures, the court said are "essential if the inmate is to have any chance whatever to prove that he does not represent a risk to the security of the institution." 462 F.Supp. at 403.

The Supreme Court's subsequent decision in *Vitek v. Jones*, 445 U.S. 480 (1980), involved the transfer of a Nebraska prison inmate to a state mental hospital. A three-judge district court, finding a protectable interest in both state law and the Due Process Clause itself, had held that procedures similar to those enumerated in *Morrissey v. Brewer*, 408 U.S. 471 (1972), were required before the transfer could be accomplished. *Miller v. Vitek*, 437 F.Supp. 569, 574 (D. Neb. 1977). Except for the requirement that counsel be provided, the Supreme Court affirmed the district court's analysis and decision in all respects.

The Court held that Nebraska had created a liberty interest by statutorily restricting transfers to mental hospitals to only those cases in which "a prisoner 'suffers from a mental disease or defect' that 'cannot be given proper treatment' in prison." 445 U.S. at 489 (quoting Neb. Rev. Stat. §83-180(1) (1976)). The Court held that the case was not controlled by *Meachum v. Fano*, 427 U.S. 215 (1976), and *Montanye v. Haymes*, 427 U.S. 236 (1976), which had held that no process was due on

interfacility transfers of prisoners. The transfers in those cases, the Court observed, "were discretionary with the prison authorities." *Id.* The Court noted that it had contemplated state-created liberty interests concerning solitary confinement in *Wolff v. McDonnell,* 418 U.S. at 571 n.19, and that "[f]ollowing *Meachum v. Fano* and *Montanye v. Haymes* [it had] continued to recognize that state statutes may grant prisoners liberty interests that invoke due process protections when prisoners are transferred to solitary confinement for disciplinary or administrative reasons. *Enomoto v. Wright,* 434 U.S. 1052 (1978), summarily aff'g 462 F.Supp. 397 (N.D. Cal. 1976)." 445 U.S. at 489.

It is clear, then, that the Supreme Court affirmed *Wright* on the ground that California prisoners possessed a state-created liberty interest protectable under the Due Process Clause. Helms claims in the instant suit that Pennsylvania has similarly provided him with a protectable liberty interest through its administrative regulations.

Pennsylvania's prisons are the responsibility of its Bureau of Correction, which has promulgated a comprehensive set of regulations to govern operations of such facilities, 37 Pa. Code pt. III. Sections 95.101 to 95.108 of those regulations are concerned with inmate conduct: enumerating and classifying misconducts, prescribing disciplinary measures, and creating a procedural framework for dealing with violations and maintaining control and security. The effect of these regulations is to limit segregation in Administrative and Disciplinary Custody to particular classes of inmates who meet objective criteria set out in the rules. Such specifications, we conclude, establish a liberty interest in all inmates to whom the regula-

tions apply not to be segregated in restrictive custody unless the regulatory criteria are met.

As intimated earlier, the regulations clearly restrict confinement in Disciplinary Custody, as distinguished from Administrative Custody, to "inmates found by the Hearing Committee to have committed Class 1 Misconducts." 37 Pa. Code §95.106(2). *See also* 37 Pa. Code §95.103(f)(1)(iv) (excluding confinement in Administrative or Disciplinary Custody as a permissible sanction for committing a Class 2 Misconduct). This regulatory scheme follows precisely the reasoning of the Supreme *Court in Wolff v. McDonnell* in which the Court noted that "solitary confinement . . . is normally imposed only when it has been claimed and proved that there has been a major act of misconduct." 418 U.S. at 571-72 n.19. In such a situation, the Court held, "there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction." *Id.*

The inmates' interests in avoiding confinement in Administrative Custody are no less real. "The purpose of placing an inmate in [Administrative Custody is] to maintain the safety of the institution by segregating an individual who poses a threat to other inmates, to staff, or to himself, poses an escape risk, or needs protection from other inmates." 37 Pa. Code §95.107(a)(1).[7] The

[7] In accord with the stated purposes of Administrative Custody, quoted in the text, the Bureau of Correction has specified four instances in which an inmate may be confined in Administrative Custody. All four grants of authority contain substantive criteria to be applied in determining whether such confinement is appropriate; each reinforces our finding that the State has conditioned administrative confinement on the occurrence of specified

members of the January 2 PRC so understood the regulations. In their affidavits to the district court, all three claimed to have based their decision to continue Helms in restrictive custody on their determination that he represented a threat to security. The similarity of these regulations to the one relied on by the court in *Wright* is apparent. *See* pp. 13-14 *supra.* Equally apparent, as in *Wright,* is that some procedural safeguards are "essential if the inmate is to have any chance whatever to prove that he does not represent a risk to the [safety] of the institution." *Wright v. Enomoto,* 462 F.Supp. at 403.

Defendants argue that they are invested with greater discretion under the regulations than was possessed by the defendants in *Wright* and that, therefore, *Wright* is inapposite. It is true, as defendants note, that the regulation relied on in *Wright* established criteria of inmate conduct which, when met, *required* segregation. We do not find this to be a meaningful distinction, however, for neither Helms nor the *Wright* plaintiffs complained of being left out of segregation when they met all conditions for such confinement. Neither regulatory scheme confers discretion on officials to place inmates in segregation if their

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events and has thus created a liberty interest. For example, Administrative Directive 004, quoted in pertinent part *supra* at 3, allows transfer to Administrative Custody if "necessary to maintain security." Section 95.104(b)(1) provides for administrative detention, pending a disciplinary hearing, of inmates alleged to have committed a Class 1 Misconduct, if such detention is warranted by the "need for control." *See* note 8 *infra.* Section 95.-104(b)(3) authorizes administrative confinement in an investigative status if "there is a threat of a serious disturbance or a serious threat to the individual or others." Finally, Section 95.-104(b)(4) provides for an administrative "protective custody" upon request of the inmate.

conduct or circumstances do not warrant it, and the lack of procedures designed to prevent unwarranted segregation form the crux of the prisoners' claims.[8]

We are persuaded that *Wright* is the appropriate controlling precedent and conclude that Helms' segregation and continuation in Administrative Custody infringed a protected liberty interest. Therefore, we must conclude that the entry of summary judgment in favor of defendants was error, for it was predicated on the non-existence of such a liberty interest.

Helms, however, requests not only a reversal of the entry of summary judgment against him, but asks us to review the record and, on the basis set forth in his argument, direct the entry of summary judgment in his favor. Inasmuch as most of the facts presented by the record before us are undisputed,[9] such a direction would be

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[8] We also reject any argument that a finding of a liberty interest is precluded by the operation of 37 Pa. Code §95.104(b)-(1), which provides:

> (1) An inmate who has allegedly committed a Class 1 Misconduct may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution, not routinely but based upon his assessment of the situation and the need for control pending application of [disciplinary] procedures. . . .

Committing the determination of objective criteria to the subjective evaluation of a particular official neither affects the creation of a protectable interest nor satisfies the requirements of the Due Process Clause. Vitek v. Jones, 445 U.S. at 490 & n.6 (citing Arnett v. Kennedy, 416 U.S. 134, 166-67 (1974) (opinion of Powell, J.), *id.* at 177-78 (opinion of White, J.), *id.* at 210-11 (opinion of Marshall, J.)).

[9] The defendants have not disputed that the procedures afforded Helms from December 3, 1978 to January 21, 1979 were as he has described them: written copies of two Misconduct re-

proper if all *material* facts were properly established in support of Helms' motion for summary judgment. We therefore proceed to an examination of relevant law to determine what facts are material to the issue whether Helms received the process he was due when he was confined in Administrative Custody and when he was convicted of a Class 1 Misconduct.

B. What Process Was Due?

It is elementary that one deprived of life, liberty, or property, as embraced by the Due Process Clause, is entitled to procedures designed to protect against arbitrary and erroneous official action. The extent and nature of those protections, unlike the existence of the protectable interest, *see Board of Regents v. Roth,* 408 U.S. 564, 570-71 (1972), depends in large measure on the "weight" to be assigned the interest being infringed. The two interests at issue in the instant case—the right not to be confined in Administrative Custody and the right not to be confined in Disciplinary custody—are very similar. Yet, as the preceding section has demonstrated, their sources in the regulations differ and, in several real respects, their deprivations work different hardships. Therefore, we treat separately the issue of what process must accompany the deprivation of each.

1. The Procedure to Effect Administrative Detention

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ports on December 4 and January 19; an appearance before a HC on December 8 at which Helms was told that he was under investigation and would remain in restrictive custody; a status review by a PRC on January 2 at which Helms was merely interviewed and told he would remain in restrictive custody; and a concurrence in the PRC's decision by the institutional superintendent.

Relying on this court's decision in *Hodges v. Klein*, 562 F.2d 276 (3d Cir. 1977) (per curiam), defendants argue that, by providing periodic "status reviews," they had satisfied the requirements of the Due Process Clause for confinement. *Hodges*, decided before the Supreme Court's summary affirmance of *Wright*, held: "The presence in this case of procedures for periodic hearing to review an inmate's assignment to the [Management Control Unit] leads us to conclude that appellant's due process rights were adequately safeguarded." *Id.* at 278.

We are not persuaded by defendants' argument for two reasons. First, the quoted holding of *Hodges* was predicated on the application of *Meachum* and *Montanye* to *intra*facility transfers. No search was made for a state-created liberty interest. Thus, it is not clear that *Hodges* required *any* due process in connection with the transfers. Second, the opinion of the district court in *Hodges* makes clear that "status reviews" were not the only procedural safeguards employed in connection with the assignment of prisoners to segregated housing. The inmates were given prior notice of the proposed administrative action and were informed of the criteria on which the decision would ultimately be based. A hearing was held at which the inmate appeared, counsel substitute was made available, and evidence offered from both sides was received. Finally, the inmate received written notification of the decision and the reasons underlying it. *Hodges v. Klein*, 421 F. Supp. 1224, 1233 (D.N.J. 1976), *aff'd*, 562 F.2d 276 (3d Cir. 1977) (per curiam). Thus, *Hodges* does not restrict the procedural protections to which Helms was due to "status reviews."

Having concluded that *Hodges* does not control the outcome of this suit, the immediate question before us

remains what process is due an inmate in restrictive custody for administrative reasons when such segregation infringes a state-created liberty interest. We note again that the thrust of Helms' constitutional complaint is that he was denied a timely hearing on whether he was properly confined in Administrative Custody. In other words, having been deprived of a liberty interest by his administrative confinement. Helms claims he was entitled to procedural due process to determine whether he fell within that class of inmates subject to segregation for administrative reasons under State regulations. If, for example, the December 8 HC was correct in describing Helms' detention as "pursuant to Administrative Directive 004," *see supra* at 3, due process was required to determine whether Helms' continued segregation was "necessary to maintain security." If, as the district court found, Helms was being detained pursuant to 37 Pa. Code §95.104(b)-(3), he was entitled to a fair determination that there existed "a threat of a serious disturbance or a serious threat to [Helms] or others." Or, if Helms was confined under the authority of 37 Pa. Code §95.104(b)(1) for having allegedly committed a Class 1 Misconduct, prison officials were required to determine, through due process, that the confinement was necessitated by "the need for control."

Turning then to the legal issue at hand, it is well to recall at this time the concerns noted earlier dealing with the importance of swift and decisive action when using administrative detentions to maintain control and security at a penal institution. Sympathetic as we are to these concerns, we are also charged with interpreting and applying the Constitution. Although the liberty interest in this analysis is a creation of the State, the minimum protec-

tions appropriate to its deprivation are "a matter of federal law [and] they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek v. Jones*, 445 U.S. at 491. To determine the degree of flexibility accorded state prison officials in this context, we turn first to the federal law announced in *Wright* as most nearly on point.

Wright serves to alleviate some of the above-mentioned concern because its holding clearly demonstrates an awareness that "due process" does not always mean "prior process." *Wright* held that in connection with administrative confinement the prisoner is entitled to (1) written notice of the proposed action before or within 48 hours of the initial placement in administrative confinement, and (2) a fair hearing before an administrative fact-finder within 72 hours of initial segregation, unless additional time is requested by the inmate. Helms was provided with written notice and a copy of the charges against him within 24 hours of his initial segregation and there is no complaint concerning the adequacy or timeliness of this notice. As to the 72-hour limit for a hearing, we do not consider the Supreme Court's summary affirmance to hold that any hearing held after 72 hours is constitutionally impermissible. Although summary affirmances are controlling on us until the Court indicates otherwise, *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975), we are not to read into the Court's action any more than was necessary to sustain the judgment of the district court. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979). We find it especially noteworthy that the time limits established by the *Wright* district court were not mentioned in the Questions Presented

section of the state's jurisdictional statement to the Court, *Enomoto v. Wright*, No. 77-504, 46 U.S.L.W. 3325 (U.S. Nov. 15, 1977). *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977). We *do* accept as Supreme Court law the holding of *Wright* that due process protections must be afforded inmates detained in administrative confinement and that the basic procedures to be followed in such a situation are the same prescribed for disciplinary proceedings in *Wolff v. McDonnell*, 418 U.S. 539 (1974).[10]

Wolff did not decide what constitutes a timely hearing. However, in *Gray v. Creamer*, 465 F.2d 179 (3d Cir. 1972), we considered the procedural due process right of prisoners in a state institution to a hearing before transfer from the general population to solitary confinement. We held that normally minimal due process required a hearing before transfer, but in certain exigencies, such as a prison riot, a hearing could be delayed a reasonable period of time. *Id.* at 185 n.6. In *Biagiarelli v. Sielaff*, 483 F.2d 508 (3d Cir. 1973), a case involving a prisoner held in investigative status for an alleged escape plot, we indicated that the time for notice and hearing might depend upon when the threat to the institution subsided. "[W]hat is reasonable must be measured against the urgency of the circumstances necessitating the action." *Id.* at 512. In *Braxton v. Carlson*, 483 F.2d 933 (3d Cir. 1973), we held that under "near mutiny" conditions at one of our federal correctional facilities, segregated con-

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[10] We emphasize the use of the term "basic" in the text. As did the district court in *Wright*, *see* 462 F. Supp. at 403-04, we express our belief that indeterminate periods of confinement in Administrative Custody may require even greater protections (not unlike, perhaps, existing status reviews) than fixed term detention in Disciplinary Custody.

finement for three days awaiting hearings was not unreasonable under the circumstances. But we concluded that absent unusual circumstances necessitating emergency measures, further incarceration under segregated conditions without hearings would not have been justified. *Id.* at 973.[11]

Thus, under the prevailing law of this circuit, a prisoner transferred to solitary confinement is entitled to a hearing prior to his confinement or, if exigent circumstances exist, within a reasonable time thereafter. In the cases discussed above, this court required a hearing to determine whether the charges leading to segregation were valid. In the context of Helms' administrative detention, we are concerned with whether he was properly classified as a security risk. Today we hold that an inmate confined in Administrative Custody, and thereby deprived of a state-created liberty interest, must be afforded a hearing, as described in *Wright* and *Wolff*, either before the confinement or, in exigent circumstances, within a reasonable period thereafter. The purpose of the hearing is to determine whether the criteria for detention in Administrative Custody have been met.

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[11] The *Wright* court also held that notice and hearing could be postponed in the event of a "continuing emergency." 462 F. Supp. at 405. We think it appropriate to note that the regulations of the Pennsylvania prison system contemplate administrative placement primarily as a preventive measure. *See* 37 Pa. Code §§95.103(b)(1)&(3). *See also* BC-ADM 004, quoted in pertinent part at 3 *supra*. We consider it likely that in such situations prison officials will deem it necessary to effect immediate confinement in restrictive custody, regardless of the existence of a "continuing emergency" like a prolonged riot. So long as notice and hearing are provided within the period required in the text, we perceive no constitutional violation in such a course.

However, where an inmate is administratively segregated to await a disciplinary hearing, it would appear that such a hearing, if held within a reasonable time after his confinement and if it adjudicated the inmate's guilt or innocence on the underlying misconduct charge, would also be dispositive of the propriety of any continued administrative segregation. Defendants in the case at bar contend such a disciplinary hearing was held on December 8, but it was not concluded because the investigation was incomplete. It is unrealistic, they assert, to return a suspected perpetrator of prison violence to the general population simply because his hearing must be delayed. Although the defendants' position seems to us to be at odds with the state regulations, we agree that the defendants' position may be sound. Our holding in this case, however, does not impose a "speedy trial" requirement for prison disciplinary hearings. It does require that an administrative detainee be afforded an opportunity to show that his administrative confinement is not warranted.

The effect of our holding is to declare that Helms was denied due process unless he was afforded a hearing, within a reasonable time of his initial confinement, to determine whether he represented the type of "risk" warranting administrative detention. Helms asserted by affidavit that he was not afforded any hearing on December 8, the only date within a reasonable time of his initial confinement on which Helms was provided any process other than notice. The defendants have not controverted this statement. On the other hand, Helms signed the December 8 HC report indicating that a hearing had been held. Although we would ordinarily not construe such a document strictly against the constitutional interests of a prisoner, other circumstances in this case persuade us

that a directed entry of summary judgment is inappropriate.

The parties to this case litigated in the district court on the assumption that the true issue in the case was whether Helms was provided a disciplinary hearing in the manner and in the time prescribed by state regulations. The briefing in the district court and before us focused on that issue. Except for plaintiff's reliance on *Wright,* no cogent arguments were presented that Helms was constitutionally entitled to process in addition to the hearing at which his guilt or innocence would be adjudged. It was therefore not unreasonable for defendants to concentrate on demonstrating compliance with the law pertaining to disciplinary hearings, rather than proving that Helms had received a hearing to determine whether he should continue to be restricted pending the investigation. We therefore believe that under such circumstances summary judgment should not be directed against the defendants, and that they should be provided an opportunity to prove that they afforded Helms his constitutional rights before the December 8, HC. No undue burden will be imposed on either the parties or the district court, because we must remand on the issue of official immunity. On the remand, defendants will have an opportunity to show, if they are able, that they acted in conformance with the law announced in this opinion.

2. The Procedures to Effect Disciplinary Detention

We turn now to Helms' claim that he was denied due process when the January 22, 1979, HC found him guilty of committing a Class I Misconduct on the strength of Lt. Kyler's hearsay account of an unidentified informant's uncorroborated story. We again note the procedural

posture of this case on appeal. We review an order granting defendants' and denying plaintiff's motions for summary judgment.

The record before us clearly indicates that Kyler's testimony was the only evidence presented at the January 22 hearing and it alone provided the basis for the finding of guilt.[12] The record also contains an unchallenged assertion by plaintiff Helms that "the credibility, reliability and factual knowledge of the incident by the alleged informant was never confirmed as set forth in the record [of the January 22 hearing]. . . ."[13] Kyler's affidavit further reveals that he had in his possession, since January 4, 1979, a notarized statement of the informant implicating Helms in the December 3 disturbance.[14] It does not appear that the HC saw this affidavit or that it was even submitted to them. No member of the HC was advised of the informant's identity and, obviously, no committee member interviewed the informant privately.

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[12] The record contains affidavits from defendants Stotelmyer and Hileman conceding this fact. The third member of the committee, defendant Smith, did not submit an affidavit.

[13] Affidavit of Aaron Helms at 3 (September 11, 1979). A similar assertion appears in §17 of the Complaint and was denied. When it was repeated in the plaintiff's affidavit, however, defendants proffered only affidavits from Stotelmyer and Hileman, which generally asserted that *Kyler's* testimony was credible, and affidavits from Kyler, which set forth his reasons for believing the informant to be reliable and credible. At no point, however, do the defendants assert that the reasons underlying Kyler's belief in the validity of the information were presented to the HC.

[14] At the hearing on January 22, 1979, Kyler testified that he had relied on information from more than one informant. Kyler's affidavit in the district court, however, referred to an affidavit from only a single informant.

These, we conclude, are the facts material to our disposition of this question and we find no genuine issue as to any of them. *Wolff* teaches that in the closely controlled environment inside prison walls, disciplinary procedures must represent a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Wolff v. McDonnell,* 418 U.S. at 556. In striking that balance, the Court concluded that confrontation and cross-examination of adverse witnesses were not required, because it believed that "adequate bases for decision" could be established through the use of other procedures. *Id.* at 568. Development of these procedures, the Court held, should be left "to the sound discretion of the officials of state prisons." *Id.* at 569.

Other courts of appeals, faced with claims similar to those pressed here, have read *Wolff* to command almost complete deference to the judgment of prison officials on the need, if any, for administrative inquiry into the credibility and reliability of an informant. *Walker v. Hughes,* 558 F.2d 1247, 1259 (6th Cir. 1977); *McLaughlin v. Hall,* 520 F.2d 382, 384-85 (1st Cir. 1975); *Willis v. Ciccone,* 506 F.2d 1011, 1018 (8th Cir. 1974). *See* Meyers & Rabiejk, *Burden of Proof and the Standard of Judicial Review in Prison Disciplinary Hearings Involving Decisions Predicated upon Uncorroborated Hearsay Evidence,* 1979 So. Ill. U.L.J. 535, 545-52. In the cited commentary, the authors contend that these courts have properly employed the "arbitrary and capricious" standard of review, limiting their judicial function to determining whether *any* evidence was offered in support of the administrative decision. *Id.* at 549-551. Further, they argue that this determination has been, and should be, made

without regard to the admissibility of the evidence under legal rules of evidence. *Id.* at 553-56, 558.

We believe, however, that in entrusting to prison officials responsibility for promulgating procedures for arriving at an adequate basis for decision, *Wolff* intended a genuine, even if single, factfinding hearing and not a charade. Although the HC has the discretion to foreclose the presence of witnesses and cross-examination, *Wolff* abjures arbitrary determinations. It therefore commands "a written statement by the factfinder as to the evidence relied on and reasons" for the disciplinary action. If this statement is intended to withstand scrutiny and win respect for prison disciplinary procedures, it must disclose more than a mere "reliance on speculation and facts not in the record." *Gomes v. Travisano,* 510 F.2d 537, 540 (1st Cir. 1974).

The facts of this case portray a state prisoner subjected to disciplinary sanctions entailing a loss of liberty on the strength of, literally, next to no evidence. Kyler's testimony before the committee, as characterized in the affidavits before us contained absolutely no indicia of reliability imputable to the alleged undisclosed informant. The HC necessarily relied solely on Kyler's assessment of the informant's story and, in so doing, abdicated its mandated responsibility of serving as an independent tribunal. The procedures employed were especially inappropriate in this case because: (1) Kyler had obtained a notarized affidavit from the informant, and (2) Kyler claimed that the informant had provided reliable and corroborating information on previous occasions. None of this minimal information, which might have provided the HC with a basis upon which to judge the informant's credibility, was made known to the committee members.

Under the tensions and strains of prison living fraught with intense personal antagonisms, determination of guilt solely on an investigating officer's secondary report of what an unidentified informant advised him, albeit by affidavit, invites disciplinary sanctions on the basis of trumped up charges. A determination of guilt on such a record, with no primary evidence of guilt in the form of witness statements, oral or written, or any form of corroborative evidence, amounts to a determination on the blind acceptance of the prison officer's statement. Such a practice is unacceptable; it does not fulfill *Wolff's* perception of "mutual accommodation between institutional needs and objections" and constitutional requirements of due process. *Wolff v. McDonnell,* 418 U.S. at 556. We realize that in prison disciplinary proceedings hearsay may serve a useful purpose and we do not preclude it. But when the tribunal's task as a factfinder is to evaluate credibility and assess reliability of the evidence presented, this process is "severely hampered" if the tribunal is permitted to rely upon mere conclusory representations. *Bartholomew v. Reed,* 477 F.Supp. 223, 228 (D. Oregon 1979). We therefore hold that when a prison tribunal's determination is derived from an unidentified informant, the procedures approved in *Gomes v. Travisono* must be followed to provide minimum due process.

> "(1) [T]he record must contain some underlying factual information from which the [tribunal] can reasonably conclude that the informant was credible or his information reliable; (2) the record must contain the informant's statement [written or as reported] in language that is factual rather than conclusionary and must establish by its specificity that

> the informant spoke with personal knowledge of the matters contained in such statement."

510 F.2d at 540.

Thus, Helms suffered a denial of due process by being convicted on a misconduct charge when the only evidence offered against him was a hearsay recital, by the charging officer, of an uncorroborated report of an unidentified informant. Thus, on remand, if the defendants do not establish official immunity as discussed in Part IV *infra,* the district court should enter summary judgment for Helms on the issue whether he was denied due process in being confined in disciplinary custody.

IV.

Although a prisoner may not have any constitutional interest in where he is confined within a correctional facility, we hold that once the State by either statute or rule confers a protectable liberty interest in not being confined in restrictive custody, that interest may not be infringed without affording him the minimal procedural safeguards appropriate to the circumstances as described in *Wolff v. McDonnell,* 418 U.S. 539 (1974), and *Wright v. Enomoto,* 462 F.Supp. 397 (N.D. Cal. 1976), *aff'd mem.,* 434 U.S. 1052 (1978). We further hold that a prisoner is denied due process when his conviction on disciplinary charges rests solely on a hearsay report of an unidentified informant's account which offers no basis for an independent assessment of the informant's credibility or reliability. Therefore, it was error to grant defendant's motion for summary judgment.

We are unable to conclude on this record whether the defendants acted reasonably in light of existing law

and with the requisite good faith in connection with Helms' confinement in restrictive custody. *See Winsett v. McGinnes,* 617 F.2d 996, 1009 (3d Cir. 1980) (en banc) (construing *Procunier v. Navarette,* 434 U.S. 555 (1978), and *Wood v. Strickland,* 420 U.S. 308 (1975)). We therefore leave the issue of official immunity to the district court on remand. Further proceedings will also be required to determine the appropriateness and availability of the requested relief.[15]

The judgment of the district court will be reversed and the cause remanded for further proceedings not inconsistent with this opinion. Cost taxed against appellees.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

---

[15] Neither party has raised or addressed the effect of the enactment of the Civil Rights of Institutionalized Persons Act, 42 U.S.C.A. §§1997-1997j (Supp. 1981). This Act would allow the district court to stay proceedings in this section 1983 action pending exhaustion of state administrative remedies. 42 U.S.C.A. §1997e(1). Exhaustion may be required, however, only if the state's administrative grievance mechanism has been certified by the Attorney General to comport with the standards of the Act, or the court makes an independent determination that the procedures are sufficient under the Act. 42 U.S.C.A. §1997e(2). We have not been advised that Pennsylvania's procedures conform with the Act or with the Attorney General's guidelines, *see* 46 Fed. Reg. 3843-52 (January 16, 1981), and are unable to make such a determination on the record before us.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 80-2393

HELMS, Aaron,

Appellant

vs.

HEWITT, LOWELL D., Supt; KYLER, B.B., CO III; STOTELMYER, R.F., Major; SMITH, B.K., Counselor III; HILEMAN, K.R., Farm Manager; ERHARD, D.R., Deputy Supt. for Treatment; HENRY, T.W. Director of Treatment; MATEER, W.W., C.I. Manager

(D. C. Civil No. 79-0950)

On Appeal From the United States District Court for the Middle District of Pennsylvania

Present: GARTH and ROSENN, *Circuit Judges* and MILLER, *Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on February 26, 1981.

* Honorable Jack R. Miller, Judge, United States Court of Customs and Patent Appeals, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, dated August 15, 1980, be, and the same is hereby reversed and the cause is remanded for further proceedings not inconsistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:
Sally Mrvos
Clerk

June 30, 1981

UNITED STATES DISTRICT COURT
For The Middle District of Pennsylvania

Civil Action No. 79-950

AARON HELMS

Plaintiff

v.

LOWELL D. HEWITT, et al.,

Defendants

Filed
Harrisburg, PA.
Aug 15, 1980

Donald R. Berry, Clerk
Per JN

Per .....
Deputy, Clerk

MEMORANDUM

Plaintiff initiated this action under the Civil Rights Act, 42 U.S. Code §1983, on July 26, 1979. He claims that his rights were violated while he was an inmate at the State Correctional Institution, Huntingdon, Pennsylvania, in the following respects:

V. CAUSES OF ACTION

23. The continuation of plaintiff in close or maximum custody for over ten (10) days without a prior finding of a misconduct or behavioral violation violated 37 Pa. Code §95.104 (b) (3), 8 Pa. B. 2687 and thus denied plaintiff due process of law in the defendants failure to follow their own regulations as guaranteed directly by the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. §1983.

24. The failure to hold a due process disciplinary hearing or convict plaintiff of misconduct charges arising out of the disturbance of December 3, 1978 until January 22, 1979 denies plaintiff due process of law as guaranteed directly by the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. §1983.

25. The use of alleged informant's information to convict plaintiff of misconduct as set forth in this Complaint violates principles of fundamental fairness as guaranteed directly by the due process clauses of the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. §1983.

On August 21, 1979, defendants filed a motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. After consideration by the U. S. Magistrate and this court the motion was denied by order dated November 7, 1979. At that time, the court stated:

> Because the court finds that due process does require a hearing prior to the transfer of a prisoner from the general population to a confinement whose

> conditions are more onerous than those encountered in the general population, absent unusual circumstances, the defendant's motion to dismiss for failure to state a claim upon which relief can be granted will be denied.

That decision was based upon the Supreme Court affirmance of *Wright v. Enomoto,* 462 F.Supp. 397 (N.D. Claif. 1976), *aff'd.* 424 U.S. 1051 (1978). However, since the previous decision in this case, the Supreme Court decided *Vitek v. Jones,* 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980), which indicates that the scope of the affirmance in *Wright* was narrow. In *Vitek, Wright* was cited for the proposition: "[T]hat state statutes may grant prisoners liberty interests that invoke due process protection when prisoners are transferred to solitary confinement for disciplinary or administrative reasons." *Vitek* at 562. In another portion of the opinion, the Court directed:

> [C]hanges in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause "as long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him." *Vitek* at 565 citing *Montayne v. Haymes,* 427 U.S. 236, 242 (1976).

Since it is now clear that *Wright* was limited to its factual basis in California law, the court believes that *Vitek* and *Meachum v. Fano,* 427 U.S. 215 (1976), control the issues raised by ¶¶23 and 24 quoted above. *Meachum* involved an administrative transfer from a medium security institution to a maximum security facility. The Court recognized that imprisonment at a

maximum security facility would undoubtedly be more onerous than in a medium security institution. However, it ruled that such transfers were within the discretion of the state officials. Furthermore, it acknowledged the intrusive effect of a decision finding that prison transfer to a more restrictive environment implicated protected liberty interests. The court stated:

> Holding that arrangements like this are within reach of the procedural protection of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. *Meachum,* at 228-9.

Turning to the case sub judice, it is the court's conclusion that, unless the officials at S.C.I. Huntingdon violated Pennsylvania law, plaintiff's placement in administrative custody following the disturbance in December of 1978 did not violate his constitutional rights. To the extent that this conclusion differs from that in the memorandum of November 7, 1979, the earlier decision is reversed.

On May 12, 1980, plaintiff filed a motion for summary judgment which was opposed on May 27, 1980 by defendant's cross-motion for summary judgment. The motions will be disposed of based on the following facts which are undisputed. On December 3, 1978, after the disturbance at Huntingdon was quelled, Helms was placed in administrative custody. The next day an institutional misconduct charge was brought against him. It alleged he conspired to riot and disrupt normal institutional routine by forcefully taking over the control room and assaulting correctional officers. Four days after he was charged, plaintiff was before the Institution Hearing Com-

mittee and was informed that his disciplinary case and confinement status would be continued pending completion of an investigation by the state police. On December 11, 1978, plaintiff was charged with criminal violations related to the prison incident.

There is a difference in the versions of plaintiff and defendants as to the disposition of the criminal charges. Plaintiff's complaint alleges that the criminal charges were dismissed on January 6, 1979. The affidavit of Buddy B. Kyler, Security Lieutenant for the State Correctional Institution at Huntingdon, states that the preliminary hearing on the criminal matter was held beginning January 10, 1979, it was continued, and the charges were dismissed on February 6, 1979. This affidavit was filed in support of defendant's cross-motion for summary judgment. Federal Rule of Civil Procedure 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule [by affidavit], an adverse party may not rest upon the mere allegation or denials of the pleadings, but his response by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Plaintiff has failed to contest the affidavit of Buddy Kyler, and the court will consider that the criminal charges against Helms were pending until February 6, 1979.

While the criminal charges were pending, the plaintiff, on January 19, 1979, was charged with another institutional misconduct arising out of the disturbance of December 3, 1978. Several days later he was found guilty of the misconduct by the Institutional Hearing Com-

mittee and sentenced to six months in disciplinary close custody. It is undisputed that the hearing committee considered information which was supplied by a prison informant.

I. WAS PLAINTIFF'S CONFINEMENT IN ADMINISTRATIVE CUSTODY FROM DECEMBER 3, 1978 TO JANUARY 22, 1979 IN VIOLATION OF PENNSYLVANIA LAW?

It is plaintiff's contention that under the applicable Pennsylvania regulations plaintiff should have been released from administrative custody after ten days of confinement unless there was a finding of a misconduct or behavioral violation. To support this argument, plaintiff relies on a regulation found at 37 Pa. Code §95.104(b)(3). The subsection urged by plaintiff is best understood in comparison with another subsection of the same regulation. The two are reproduced below.

> Section 95.104. Behavior control and confinement.
>
> (b) Individual. Individual behavior control and confinement shall conform with the following:
>
> (1) An inmate who has allegedly committed a Class I Misconduct may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution, not routinely but based upon his assessment of the situation and the need for control pending application of procedures under §95.103 of this title (relating to procedures).
>
> . . .
>
> (3) An inmate may be temporarily confined to Close or Maximum Administrative Custody in an

> investigative status upon approval of the officer in charge of the institution where it has been determined there is a threat of a serious disturbance, or a serious threat to the individual or others. The inmate shall be notified in writing as soon as possible that he is under investigation and that he will receive a hearing if any disciplinary action is being considered after the investigation is completed. An investigation shall begin immediately to determine whether or not a behavior violation has occurred. If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated but in all cases within ten days.

Defendants, in a response to requests for admissions, concede the authenticity of a memorandum which was prepared by Lowell D. Hewitt, Superintendent of the State Correctional Institution at Huntingdon, dated December 5, 1978. In the memorandum, Hewitt reports, inter alia: "After the inmates were locked in their cells a list of insurgent inmates who were involved was compiled. The list included . . . F8321 Helms, ..." It is apparent from this statement that immediately after the prison incident Helms was identified as involved in the misconduct. Rioting or inciting to riot as well as assault and fighting are considered Class I Misconducts. 37 Pa. Code §95.102. Thus, at its inception plaintiff's confinement in administrative custody came under subsection (b) (1) rather than (b) (3). The fact that investigation continued for assessment of possible criminal charges is irrelevant. Subsection (b) (1) is silent as to how soon disciplinary procedures must be instituted. Nor does it direct prison officials to release inmates into the general population within any specific amount of time. Pennsyl-

vania regulations leave that decision to the discretion of the men charged with operating the prison.

Even if it were subsection (b) (3) which applied, plaintiff's argument would be to no avail. The final sentence of that subsection directs that an inmate must be released from administrative custody "if no behavior violation has occurred." It does not state, as plaintiff paraphrases in his brief, that he should be released after ten days "unless he has been found to have committed a misconduct." Brief in Support of Plaintiff's Motion for Summary Judgment, p. 12. As the facts above establish, plaintiff was charged with misconduct exposing him to criminal sanctions as well as sanctions for violation of prison regulations. The superintendent's memo demonstrates that prison officials knew that a behavior violation *had* occurred. The fact that they delayed charging him with additional institution violations because criminal charges were pending is irrelevant. The authorities were acting within their discretion when they determined to keep him in segregated confinement pending the outcome of all charges. The fact that charges against other prisoners were disposed of more promptly does not strengthen plaintiff's case. Some cases may have been more clear-cut. Given the seriousness of the disturbance at Huntingdon, the authorities were justified in exercising their discretion to wait until the facts were fully developed through investigation, and then dispose of plaintiff's misconduct charges.

Plaintiff alleged that his civil rights were violated because the Hearing Committee which ruled on the misconduct charge of January 19, 1979 relied on information from a prison informant. It is established that there is no right of confrontation and cross-examination in prison

disciplinary proceedings. The prison officials have discretion to permit the accused to cross examine witnesses against him or not as the situation within the institution dictates. *Wolff v. McDonnell,* 418 U.S. 539, 569 (1973).

In Pennsylvania a prisoner has certain procedural rights under applicable prison regulations. 37 Pa. Code §95.103(e). These give the chairman of the Hearing Committee the discretion to control for "security, and other valid considerations" the questioning an inmate may do at his hearing.

Defendants' motion for summary judgment will be granted. Plaintiff's motion for summary judgment is denied.

(s) Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: August 15, 1980

UNITED STATES DISTRICT COURT
For The Middle District of Pennsylvania

Civil Action No. 79-950

AARON HELMS

Plaintiff

v.

LOWELL D. HEWITT, et al.,

Defendants

ORDER

It Is Hereby Ordered That:

1. Plaintiff's motion for summary judgment is denied;

2. Defendants' cross-motion for summary judgment is granted;

3. Judgment is entered in favor of defendants.

(s) Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: August 15, 1980

Joint Appendix

Supreme Court, U.S.
FILED
APR 20 1982
ALEXANDER L. STEVAS
CLERK

No. 81-638

In the Supreme Court of the United States

October Term, 1981

LOWELL D. HEWITT, Superintendent; B. B. KYLER, C. O. III; R. E. STOTELMYER, Major; B. K. SMITH, Counselor III; K. R. HILEMAN, Farm Manager; D. R. ERHARD, Deputy Superintendent for Treatment; T. W. HENRY, Director of Treatment; W. W. MATEER, C. I. Manager; SCI-HUNTINGDON,

Petitioners

v.

AARON HELMS,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

JOINT APPENDIX

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Petition Filed September 24, 1981
Certiorari Granted March 8, 1982

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DOCKET ENTRIES — UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 79-950

HELMS, Aaron,

Plaintiff

v.

HEWITT, Lowell D., Supt.; KYLER, B. B., CO III; STOTELMYER, R. E., Major; SMITH, B. K., Counselor III; HILEMAN, K. R., Farm Manager; ERHARD, D. R., Deputy Supt. for Treatment; HENRY, T. W., Director of Treatment; MATEER, W. W., C. I. Manager

Defendants

DATE	NR.	PROCEEDINGS
1979		
July 26	1	COMPLAINT
July 26	2	PETITION of plaintiff to proceed in forma pauperis; and AFFIDAVIT of plaintiff in support of Petition to Proceed in Forma Pauperis stating he has no money in his prison account. Order Within.
July 26	3	FIRST REQUEST of plaintiff for Production of Documents and Answers to Interrogatories. J.S. 5 1 Copy of docket to Muir, 1 to Havas.

July 27—4—ORDER of Mag. Havas IT IS HEREBY ORDERED that Plaintiff's request to proceed in forma pauperis is granted. Clerk of Courts is directed to serve Pltff's complaint in accordance with FRCP 4. Defendants are directed to file a response to Pltff's complaint within 20 days of service. Copy to Atty Fishman, from H office.

July 27—5—SUMMONS issued and handed to US Marshal for service with c.c. order and copy complaint and Doc. 3 attached. (Prepared in Hbg.)

Aug 16—6—NOTICE to plf's counsel; Reassgn to Judge Rambo; 2 copies of docket to Rambo; 1 to Havas.

Aug. 21—7—MOTION of defendants' to dismiss or in the alternative for summary judgment, and C of S.

Aug. 29—8—MOTION of pltfs for extension of time to respond to defts' motion to dismiss or in the alternative motion for summary judgment, and Aug. 29 CERTIFICATE of concurrence, and Aug. 29 CERTIFICATE of service.

Aug. 31—8A—BRIEF of dfndts in support of motion to dismiss or, for summary judgment (with exhibits).

Aug. 30—9—ORDER Upon consideration of Plaintiff's motion for extension of time filed on August 29, 1979, IT IS HEREBY ORDERED that Plaintiff be granted 25 days rather than 15 days to file an opposing brief to that filed by Defendants in support of their motion to dismiss or in the alternative for summary judgment. (Havas) Copies to counsel of record.

Aug. 29— —SUMMONS returned served on 8/1/79 as to dfndts. Erhard (MF&E $22.20; Stotelmyer, Henry, Smith, Atty. Gen'l, Kyler, and Hileman all $3 (MF&E

$18.00); on 8/6/79 as to Hewitt (MF&E $7.80); On 8/24/79 as to Mateer (MF &E 22.20).

Sept. 20—10—MOTION of plaintiff for continuance pursuant to Rule 56 (f) or in the alternative opposition to defts' motion to dismiss/motion for summary judgment, and c of s.

Sept. 20—11—BRIEF of plaintiff in support of plaintiff's motion for continuance pursuant to Rule 56 (f) or in the alternative opposition to defts' motion to dismiss motion for summary judgment.

Sept. 28—12—REPORT OF MAGISTRATE—It is respectfully recommended that defts' motion for summary judgment be granted in all respect and that plaintiff's request for counsel fees be denied. (H) Copy to Fishman, Filipi, Havas and Court.

Sept 28—13—NOTICE Exceptions to the Report of the Magistrate must be filed within 10 days of the date of the Report. (Havas) Copies to Fishman, Filipi, Havas and Court.

Oct. 9—14—OBJECTIONS of Plaintiff to Report and Recommendations of Magistrate, and C of S.

Oct. 9—15—BRIEF in support of Objections of Plaintiff to Report and Recommendations, and C of S. Copies to Mag. Havas.

Nov 7—16—MEMORANDUM of Judge Rambo. Copies to all Judges, Fishman, Filipi, Havas, Court and Quinn from H.

Nov 7—17—ORDER—Defts' Motion for dismissal and defts' and plaintiff's motion for summary judgment are hereby denied for the reasons set forth in the ac-

companying memorandum filed this date. Discovery is to be completed no later than Dec. 15, 1979. (R) Copies to all Judges, Fishman, Filipi, Havas, Court and Quinn from H.

Nov. 15—18—FIRST REQUEST of plaintiff for admissions with exhibits attached and C. OF S.

Nov. 15—19—MOTION of plaintiff to file an amended complaint, and AMENDED COMPLAINT of plaintiff, and C. OF S.

Nov. 16—20—ANSWER of defts to the complaint. C. of S.

Nov. 30—21—LETTER (Copy) to Richard G. Fishman, Esq., dated 11/28/79, from Francis R. Filipi, Asst. Atty. Gen. advising that a copy of defendants answer was inadvertently served upon plaintiff Helms rather than counsel.

Dec. 3—22—ORDER—IT IS ORDERED THAT: 1. Plaintiff's motion to file an amended complaint (a) is granted as to the amendment of paragraph 22, (b) is denied as to paragraph six of the Prayer for Relief; 2. Plaintiff is to amend the Prayer for Relief to comply with Rule 101.06 of the Rules of Court for this District. (R) Copies to counsel of record.

Dec. 7—23—AMENDED COMPLAINT of Plaintiff, and C of S.

Dec. 10—24—MOTION of plaintiff to compel production of Documents and Extend Discovery Deadline; C. of S.

Dec. 10—25—BRIEF of plaintiff in support of Motion to compel production of documents and Extend Discovery Deadline (C of S in Doc #24)

Dec. 14—26—SECOND SET OF REQUESTS FOR ADMISSIONS of plaintiff & c of s.

Dec. 17—27—ANSWER of defts to amended complaint. C. of S.

Dec. 17—28—RESPONSE of defts to pltf's first request for admissions. C. of S.

1980

Jan. 16—28A—RESPONSE of defts to plf's 2nd set of Regs. for Admissions.

Jan. 21—29—ORDER—1. the discovery deadline is extended to 3/31/80. 2. Defts are to respond to pltf's First Request for Production of Documents and Answers to Interrogatories within 20 days of the date of the * * *

Mar. 12—30—MOTION of Plaintiff for sanctions, and C. OF S.

Mar. 12—31—BRIEF of Plaintiff in support of motion for sanctions, and C. OF S. (on Motion)

Mar. 20—32—THIRD SET OF REQUESTS of pltf. for admissions & c of s.

Apr 18—33—RESPONSE of defts to plf's Third Set of Requests for Admission; C. of S.

May 12—34—MOTION of plaintiff for Summary Judgment, and C of S.

May 12—35—BRIEF in support of Plaintiff's Motion for Summary Judgment, and C of S.

May 27—36—AMENDED ANSWER of Defendants to Amended Complaint, and WRITTEN CONSENT of Atty. Fishman (for Pltff) to Amendment, and C. OF S.

May 27—37—CROSS MOTION of Defendants for summary judgment, with Affidavits and C. OF S.

May 27—38—BRIEF of Dfndts in support of their cross-motion for summary judgment and in opposition to pltff's motion for summary judgment, with exhibits attached, and C. OF S.

June 9—39—OPPOSITION of plaintiff to defendants' cross-motion for summary judgment and MOTION to strike part of the affidavit of Buddy B. Kyler, and C. OF S.

Aug. 15—40—MEMORANDUM of Court. (R)

Aug. 15—41—ORDER of Court, IT IS HEREBY ORDERED THAT: 1) Pltff's motion for summary judgment is denied; 2) Dfndts' cross-motion for summary judgment is granted; 3) Judgment is entered in favor of defendants. (R) Copies memo and order to Fishman, Filipi, Quinn, Security copy in vault.

Aug. 15— —J.S. 6

Aug. 25—42—LETTER dated Apr. 23, 1980 from Francis Filipi to Atty. Fishman re: Fishman's Motion for Sanctions to be withdrawn once outstanding discovery requests have been met & re: x-rays on Woodbury & Reese (attachment thereto).

Sept. 8—43—NOTICE OF APPEAL of plaintiff, from the Order of Court dated August 15, 1980 denying plf's Motion for Summary Judgment; granting defts' Cross-Motion for Summary Judgment; and entering Judgment in favor of all Defts.; C. of S. Copy to Atty Fishman, Filipi, Court with T/L; and to Court of Appeals with T/L and c/c docket sheet.

Sept. 18— —RECORD ON APPEAL sent to U.S. Court of Appeals consisting of docs. 1-43 together with transmittal letter & cert cc of docket entries.

Oct 1—44—LETTER to counsel from Court of Appeals dated 9/29/80 docketing this case to NO. 80-2393 and Re: Briefing Schedule.

Oct. 6—45—RECEIPT from Ct. of Appeals for record on appeal.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 80-2393

• • • •

655 F.2d 487 (1981)

1980

September 29, Appeal docketed in U.S.C.A. IFP in D.C.

Sept. 29—(In Forma Pauperis in D.C.—see D.C. order dated July 27, 1979, granting Plaintiff's request to proceed in forma pauperis, etc., by U.S.D.J. Magistrate, John Havas—see copy attached to Notice of Appeal) Certified copy of Notice of Appeal, rec'd. Sept. 17, 1980, filed. Record, rec'd. Sept. 22, 1980, filed.

Oct. 6—Appearance of Richard G. Fishman, Esq., for appellant, filed.

Oct. 27—Brief for appellant, rec'd October 29, 1980, filed. (4cc) Certification of bar membership attached.

Oct. 27—Appendix, rec'd October 29, 1980, filed. (4cc)

Oct. 29—Proof of service of appellant's brief and appendix by mail on October 27, 1980, filed.

Dec. 4—Appearance of Francis R. Filipi, Esq., for appellees, filed.

Nov. 28—Consent motion by appellees for leave to extend time to file brief to December 11, 1980, filed. (4cc) Service attached.

Dec. 11—Submitted on above consent motion. Clerk.

Dec. 16—Letter dated December 12, 1980 from Richard G. Fishman, Esq., counsel for appellant, requesting 20 minutes of argument time on behalf of appellant, rec'd for the information of the Court. (4cc) Send to merits panel.

Dec. 17—Order (Clerk) granting the above consent motion, with filing as of the date of this order, filed.

Dec. 17—Brief for appellees, rec'd December 11, 1980, filed. (25cc) Service by mail on 12/10/80 attached. Certification of bar membership attached.

Dec. 19—Reply brief for appellant, rec'd December 22, 1980, filed. (4cc) Certification of bar membership rec'd 1/5/81.

Dec. 22—Proof of service of appellant's reply brief by mail on December 19, 1980, filed.

1981

Jan. 4—Certification of bar membership by Richard G. Fishman, Esq., counsel for appellant, filed.

Feb. 5—Order (Garth, C.J.) directing 15 mins. oral argument time for each side, filed.

Feb. 26—Argued. Coram: Garth & Rosenn, C.J. & Miller, Assoc. J., U.S. Ct. of Customs & Patent Appeals.

Mar. 26—Letter dated 3/24/81, from Richard G. Fishman, Esq., counsel for aplnt, rec'd for info. of Ct.

May 29—Letter dated 5/27/81, from Richard G. Fishman, Esq., counsel for applt., rec'd for info. of Ct.

June 30—Opinion of the Court (Garth, Rosenn & Miller, J. sitting by designation), filed.

June 30—Judgment reversing & remanding cause for further proceedings, etc., w/costs against appees, filed.

July 14—Bill of costs for applt., w/serv., filed.

July 22—Cert. J. in lieu of mandate issued.

July 22—Record ret. to C of DC.

July 27—Receipt for record rec'd from C of DC., filed.

Oct. 5—Notice—Cert. filed 9/24/81, filed. (S.C. No. 81-638)

BRIEF OF DEFENDANTS IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

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* * * *

County of Huntingdon
Commonwealth of Pennsylvania ss:

AFFIDAVIT

I, Dennis R. Erhard, being duly sworn according to law despose and state that I am the Deputy Superintendent for Treatment at the State Correctional Institution at Huntingdon and that in that capacity I served as a member of the Program Review Committee.

In regard to plaintiff's allegations as a member of the Program Review Committee I reviewed his place of confinement on January 2, 1979. This review was not an appeal from the original misconduct charge which was still unresolved at that time, but rather an administrative review consistent with Administrative Directive 801 to determine whether the placement of Mr. Helms was administratively proper. At that time I was aware as is indicated on the JBC-141D, Part III (copy attached) that he was to be arraigned before the District Magistrate on the following day.

The determination to continue him in close custody was administrative and was based upon a concern that he could potentially pose a danger to staff and to other inmates if released back to general population. At the State Correctional Institution at Huntingdon at that time because of the great number of individuals that had to be confined in

a restrictive housing unit due to the December 3rd incident, some individuals were placed in an area otherwise designated as disciplinary custody close.

The physical attributes of these cells are similar to those of administrative custody and plaintiff was not placed there as a punishment, but rather as stated above for administrative security reasons.

I voted to maintain him in that status without malice toward him and in the good faith belief that this action was reasonable and proper and best safeguarded the institution from further incidents.

The foregoing information is true and correct to the best of my information, knowledge and belief.

(s) Dennis R. Erhard
DENNIS R. ERHARD

Sworn to and subscribed
before me this 30 day
of August 1979.

(s) James H. Miller
NOTARY PUBLIC

James H. Miller, Notary Public
Smithfield Township, Huntingdon County

My Commission Expires Feb. 1, 1982

Member, Pennsylvania Association of Notaries

COMMONWEALTH OF PENNSYLVANIA

Department of Justice
Bureau of Correction

FORM JBC-141 D PART III

PROGRAM REVIEW COMMITTEE ACTION

—Misconduct —Periodic Review —Other

BC Number; Name, Aaron Helmes; Institution, SCIH; Misconduct Time 24 Hr. Base, N/A; Misconduct Date, N/A; No. from PART 1, N/A.

INMATE PLEA —Not Applicable; —Guilty; —No Plea; —Not Guilty; Date of Review, 1-2-79.

PROGRAM REVIEW COMMITTEE'S DECISION AND ITS RATIONALE

In accord with Administrative Directive 801, the following information is submitted as the summary of the thirty day review of the above named inmate.

Sentence Data: 2½ years to 6 years, Philadelphia County; Robbery, Possession of an Instrument of Crime—General Weapon, VUFA, Conspiracy. Effective date of sentence is 10-11-77. Minimum sentence expires 4-11-80 and the maximum sentence expires 4-11-83. No detainers are indicated.

Placement: Restricted Housing Unit 12-3-78, misconduct #90908 for "Assaulting officers and conspiracy to disrupt normal institution routine by forcefully taking over the Control Center".

PRC Review #: First interview.

Aaron Helmes was placed in the R.H.U. on 12-3-78 because he was with the group of inmates returning from

gym by way of C Block when several inmates assaulted Corrections Officers and attempted to take over a portion of the institution. The Hearing Committee convened on the misconduct on 12-8-78, however had insufficient information at that time to directly implicate Helmes in the attempted take over. The Hearing Committee's actions stated "No finding as to guilt reached at this time, due to insufficient information". He was placed in Disciplinary Custody Close under the provisions of Administrative Directive 004 pending investigation by the Pennsylvania State Police. It should be noted that he is scheduled to be arraigned before the District Magistrate on January 3, 1979. His status will remain unchanged until additional information is obtained from the State Police regarding his involvement in the December 3, 1978 incident.

Helmes was transferred to SCIH from EDCC in February of 1978. At his initial interview with the P.R.C. he indicated that he was not happy with his transfer and said he would have preferred to remain at SCIG or to have been transferred to SCIP. Prior to the misconduct of December 3, 1978 he had received one previous misconduct which was for "Disrespect towards an officer" for which he was confined to Administrative Custody Maximum for 30 days. Subsequent to being confined to the R.H.U. he received a misconduct for "Disturbing the block" for which he received a reprimand and was informed by the Hearing Committee that any future misconducts of that nature would result in a move to D.C. Maximum.

Continue Disciplinary Custody Close until more inmation is received regarding his involvement in the December 3rd incident. Personal Reveiw 2-2-79.

* * * *

1-8-79

Commissioner Robinson: In accordance with Adm. Dir. 801, revised Feb. 1977, I have personally reviewed this inmate's status as required by Section VI, F and I concur with the findings of the P.R.C. as outlined above.

(s) Lowell D. Hewitt
Lowell D. Hewitt, Supt. SCIH

DECISION RELATIVE TO HEARING COMMITTEE'S VERDICT

—Not Applicable; —Sustain; —Sustain-Amend; —Refer Back For Further Study; —Exonerate Inmate.

Names of Program Review Committee Members, D. R. Erhard, Deputy Supt./Treatment; T. W. Henry, Director of Treatment; W. W. Mateer, C.I. Manager.

Hearing Committee and Program Review Committee action was completed.

Date 1/8/79

(s) Lowell D. Hewitt
Superintendent's Signature

County of Huntingdon
Commonwealth of Pennsylvania ss:

AFFIDAVIT

I, Terry W. Henry, being duly sworn according to law depose and state that I am the Director of Treatment at the State Correctional Institution at Huntingdon and that in that capacity I am a member of the Program Review Committee.

In regard to plaintiff's allegations I reviewed his confinement as a member of the Program Review Committee on January 2, 1979 and voted with the other committee members to continue the restrictive confinement for plaintiff for administrative reasons pending further investigation. As a member of the Program Review Committee we do not determine initial placement in a case such as the plaintiff's, but rather whether administrative reasons exist for continuing the already existing confinement.

Although the plaintiff was in an area designated as disciplinary custody this was not a disciplinary placement and done as stated above, for administrative reasons, I voted to continue him in this restricted status out of a concern for the safety of all involved and in the good faith belief that it was a proper exercise of my discretionary duties. This action was taken by me without malice towards the plaintiff.

The foregoing information is true and correct to the best of my information, knowledge and belief.

(s) Terry W. Henry
Terry W. Henry

Sworn to and subscribed
before me this 30 day
of August 1979.

(s) James H. Miller
NOTARY PUBLIC

James H. Miller, Notary Public
Smithfield Township, Huntingdon County

My Commission Expires Feb. 1, 1982

Member, Pennsylvania Association of Notaries

County of Lycoming
Commonwealth of Pennsylvania ss:

AFFIDAVIT

I, Lowell D. Hewitt, being duly sworn according to law, depose and state that I was at all times relevant to Plaintiff's complaint the Superintendent of the State Correctional Institution at Huntingdon.

In regard to Plaintiff's allegations, and consistent with my capacity as Superintendent of that Institution, on January 8, 1979, I reviewed the action of the Program Review Committee which was taken by them on January 2, 1979, as is evidenced by the attachment to Deputy Superintendent Erhard's affidavit. Subsequent to this initial review, I reviewed monthly their recommendations. Their initial determination, in my view, was to continue the Plaintiff in restricted custody for administrative reasons, not as punishment. As the Administrator of that Institution, this action was reasonable and proper, due to the situation which occurred on December 3, 1978, in which numerous assaults were perpetrated upon staff by inmates and the general riotous condition prevalent in the Institution.

Subsequent to January 22, 1979, the date on which the Plaintiff had his hearing regarding his actions on December 3, 1978, I had opportunity to continue to review the Program Review Committee's decision on his place of confinement. In each review until Plaintiff's transfer to another Institution, I concurred with the Program Review Committee, both because I believed there was credible evidence that he had assaulted Sgt. Phillips and that this action was disciplinary, and because of his involvement in this assault return to general population was unadvisable.

All actions taken in my capacity were done in accordance with the Administrative Directives of the Bureau of Correction, the law, and constitutional concepts as I understand them. No action was taken in regard to Plaintiff with malice toward him, but were taken in good faith belief that they were proper.

The foregoing is true and correct to the best of my information, knowledge, and belief.

(s) Lowell D. Hewitt

Sworn to and subscribed before
me this 30th day of August, 1979.

(s) Sondra S. Smith
Notary Public

Commission expires 8/17/81

County of Huntingdon
Commonwealth of Pennsylvania ss:

AFFIDAVIT

I, Kaye R. Hileman, being duly sworn according to law depose and state that I am employed at the State Correctional Institution at Huntingdon in the capacity as Farm Manager and that in regard to plaintiff's allegations I sat as a member of the Hearing Committee on January 22, 1979.

At that hearing credible evidence was presented through the testimony of Lieutenant Kyler that convinced me that more likely than not the plaintiff was guilty of assault of Sergeant Phillips as charged. I understood that the information that Lieutenant Kyler presented was not first hand but had been supplied to him through his investigation including interviewing informants who could not be identified for their safety. I voted for a finding of guilty without malice in the good faith belief that the plaintiff was guilty as charged and that my vote was a good faith exercise of my duty.

The foregoing information is true and correct to the best of my information, knowledge and belief.

(s) Kaye R. Hileman
Kaye R. Hileman

Sworn to and subscribed
before me this 30 day
of August, 1979.

(s) James H. Miller
NOTARY PUBLIC

James H. Miller, Notary Public
Smithfield Township, Huntingdon County

My Commission Expires Feb. 1, 1982

Member, Pennsylvania Association of Notaries

County of Huntingdon
Commonwealth of Pennsylvania ss:

AFFIDAVIT

I, Buddy B. Kyler, being duly sworn according to law depose and state that I am a Lieutenant at the State Correctional Institution at Huntingdon.

Regarding plaintiff's complaint I investigated the incidents of December 3, 1978 availing myself of information received through the State Police as well as from my independent investigation. In conducting this investigation which included interviewing various inmates whose safety could not be guaranteed if their identity were known by those that they implicated in the incident I became convinced that Mr. Helms had indeed assaulted Sergeant Phillips on December 3, 1978.

Upon the conclusion of the investigation I charged the plaintiff with assault of Sergeant Phillips as is shown in the misconduct form, Part I, attached to Robert Stotelmyer's affidavit. I took this action not out of animosity for the plaintiff, but rather in the good faith belief that he had committed an assault and therefore should be charged with an institutional misconduct for this incident. As the reporting officer I do not vote on his guilt or innocence and perform a function of witness. All actions I took in this regard were done in the good faith belief that they were consistent with my responsibilities as a correctional officer designated to investigate this incident and were proper.

The foregoing information is true and correct to the best of my information, knowledge and belief.

(s) Buddy B. Kyler
Buddy B. Kyler

Sworn to and subscribed
before me this 30 day
of August 1979.

(s) James H. Miller
NOTARY PUBLIC

James H. Miller, Notary Public
Smithfield Township, Huntingdon County

My Commission Expires Feb. 1, 1982

Member, Pennsylvania Association of Notaries

County of Huntingdon
Commonwealth of Pennsylvania ss:

AFFIDAVIT

I, Wayne W. Mateer, being duly sworn according to law depose and state that I am the Correctional Industries Manager for the State Correctional Institution at Huntingdon and that from time to time I sit as a member of the Program Review Committee.

In regard to this temporary duty I sat as a member of the Program Review Committee on January 2, 1979 and reviewed the plaintiff's confinement status. It was my understanding that the plaintiff was not placed in restrictive housing for disciplinary purposes, but rather administratively to assure the safety of the institution and of the staff and inmates. This placement had been required because of preliminary information that he had participated in a near riot at the institution on December 3, 1978.

The scope of my review was to determine whether it was safe to release the plaintiff from this confinement. I voted to continue him in confinement understanding that he was to be arraigned the following day on charges and believing that this was necessary for the safety and well being of the institution. I acted without malice towards the plaintiff and in the good faith belief that my review of his pre-existing status of confinement was reasonable and proper.

The foregoing information is true and correct to the best of my information, knowledge and belief.

(s) Wayne W. Mateer
Wayne W. Mateer

Sworn to and subscribed
before me this 30 day
of August 1979.

(s) James H. Miller
NOTARY PUBLIC

James H. Miller, Notary Public
Smithfield Township, Huntingdon County

My Commission Expires Feb. 1, 1982

Member, Pennsylvania Association of Notaries

County of Huntingdon
Commonwealth of Pennsylvania ss:

AFFIDAVIT

I, Robert E. Stotelmyer, being duly sworn according to law depose and state that I am employed by the Bureau of Correction at the State Correctional Institution at Huntingdon and that during the relevant period of time I held the rank of major of the guard at that institution.

In regard to plaintiff's complaint I chaired the hearing held on January 22, 1979 regarding plaintiff's involvement in the riotous situation of December 3, 1978. A copy of the written notice of the misconduct as well as a copy of the Hearing Committee's determination is appended hereto.

At that hearing Lieutenant Buddy B. Kyler appeared and testified before Mr. Helms from information obtained from informants. The informants could not be brought forward for their own safety and furthermore, the Hearing Committee did not take the direct testimony of the informants outside of the presence of the plaintiff for the same reason. After hearing all of the evidence in this case I and the two other individuals sitting as Hearing Committee members determined that more likely than not Mr. Helms had assaulted Sergeant Phillips and was guilty of the misconduct as charged.

This hearing was held to conclude an earlier misconduct which had been placed against the plaintiff which had been administratively continued because of the situation immediately after December 3 and the need to perform further investigations to determine which inmates had been

involved and to what degree. This second hearing was held to conclude the outstanding charges against plaintiff arising from the December 3rd incident.

My vote to find Mr. Helms guilty was based upon my belief that more likely than not he committed the offense as charged and I bear no animosity towards the plaintiff, but rather took my action in the good faith belief that it was a proper exercise of my fact finding authority as a member of the Hearing Committee.

The foregoing information is true and correct to the best of my information, knowledge and belief.

(s) Robert E. Stotelmyer
Robert E. Stotelmyer

Sworn to and subscribed
before me this 30 day
of August, 1979.

(s) James H. Miller
NOTARY PUBLIC

James H. Miller, Notary Public
Smithfield Township, Huntingdon County

My Commission Expires Feb. 1, 1982

Member, Pennsylvania Association of Notaries

COMMONWEALTH OF PENNSYLVANIA

Department of Justice
Bureau of Correction

No. 90986

FORM JBC-141D PART I

☒ MISCONDUCT REPORT ☐ OTHER

BC Number F-8321; Name Helms, Aaron; Institution SCIH; Misconduct Time 24 Hr. Base 1950 hrs.; Misconduct Date 12/3/78.

Quarters, D; Assignment, Plumbing Shop; Place of Misconduct, C Block.

Other Inmates or Staff Involved or Witnesses (Check I or W).

BC Number—Name—I—W—BC Number—Name—I—W.

Misconduct, Assault.

Staff Member's Version: Following a major disturbance on December 3, 1978, an investigation conducted by S.C.I.H. Staff and Pa. State Police produced information from confidential informants that F-8321 Helms was seen in the front of C Block during the assault and was seen striking Sgt. Phillips.

Immediate Action Taken and Reason: Confined to R.H.U.

Staff Member Reporting Misconduct, Signature and Title: (s) B. B. Kyler, CO III.

Action Approved by Ranking C.O. on Duty, Signature and Title; (s) A. Domovich, CO III.

Date and Time Inmate Given Copy: Date, 1/19/79; Time 24 Hour Base, 1530.

Hearing Date, 1/22/79; Hearing Time, 1:00 P.M.; Location of Hearing, B Block; Misconduct Category, ☒ Class 1 ☐ Class 2.

Signature of Person Serving Notice, (s) [illegible] CO I.

Notice To Inmate

You are scheduled for a hearing on this allegation on the date and the time indicated or as soon thereafter as possible. You may remain silent, if you wish, and anything you say will be used against you both at the hearing and in a court of law if this matter is referred for criminal prosecution. If you choose to remain silent, the hearing committee may hold your silence against you, but they must have some other evidence besides your silence in order to find you guilty. If you indicate that you wish to remain silent, you will be asked no further questions.

You may be represented by another inmate of general population status or a member of the institutional staff at your hearing.

You may request witnesses who will be permitted to testify at the hearing provided they are willing, relevant and do not create a security hazard; relevancy and security will be determined by the chairman of the hearing committee.

If you wish to take advantage of either or both of these choices, please notify the chairman of the hearing committee in writing immediately on the form provided.

☐ If this block is checked and you are found guilty of the above described misconduct, the hearing committee may suspend or revoke your pre-release status.

COMMONWEALTH OF PENNSYLVANIA

Department of Justice
Bureau of Correction

FORM JBS-141 D PART II B

HEARING COMMITTEE ACTION: ☒ MISCONDUCT, ☐ OTHER

BC Number, F-8321; Name, Helms, Aaron; Institution, S.C.I.H.; Misconduct Time 24 Hr. Base, 1950 hrs.; Misconduct Date, 12/3/78; No. from PART 1, 90986.

INMATE PLEA: ☐ Not Applicable; ☐ Guilty; ☐ No Plea; ☒ Not Guilty; Hearing Committee Verdict: ☒ Guilty, ☐ Not Guilty; Hearing Date, 1/22/79; Hearing Time, 14:05.

HEARING COMMITTEE ACTION

☐ See Appendices

☒ See JBC-141D PART IIC for Inmate Version and Witness Statements

☐ Dismiss the Charge (s); ☐ Reprimand; ☐ Administrative Custody-Close; ☐ Administrative Custody-Maximum; ☒ Disciplinary Custody-Close; ☐ Disciplinary Custody-Maximum; ☐ Change Living Quarters; ☐ Restriction to Quarters; ☐ Privilege Restriction (s); ☐ Probationary Period; ☐ Suspend Pre-release Status; ☐ Revoke Pre-release Status; ☐ Change in Program; ☒ Transfer Recommendation; ☐ Other;

Use space below to indicate details of findings of fact and action taken.

Helms is found guilty of assault, based on the information provided by Lt. Kyler. The informants were not identified for their safety.

ACTION: Disciplinary Custody Close, 6 months, effective December 3, 1978. Review date 2-2-79. Recommend transfer for separation.

RATIONALE: Extremely serious misconduct, several people were injured in this incident.

NOTE: This finding and disposition concludes action on misconduct #90908, heard Dec. 8, 1978 without conclusion.

Disposition of Other Inmates Involved

Names of Hearing Committee Members and Titles: R. E. Stotelmyer, Major, B. K. Smith, Counsel III, K. R. Hileman, Farm Manager

Hearing Committee Report and All Appended Information Must Be Signed. Signature Indicates Finished Report With Appendices (s) Major R. Stotelmyer, Signature of Hearing Committee Chairman

YES ☒ NO ☐ I have heard the decision and have been told the reason for it and what will happen.

YES ☒ NO ☐ The circumstance of the charge has been read and fully explained to me.

YES ☒ NO ☐ I have had the opportunity to have my version reported as part of the record.

YES ☒ NO ☐ I have been advised that I may, within 15 days, request a formal review, and understand that this request must contain specific reasons for the review.

(s) Aaron Helms F-8321
Inmate's Signaure

AFFIDAVIT OF PLAINTIFF PURSUANT TO RULE 56(f) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Commonwealth of Pennsylvania
County of Philadelphia ss:

I, AARON HELMS, being duly sworn according to law depose and state on the basis of my own personal knowledge that the following is true and correct:

On December 3, 1978, I was confined on D-Block in the State Correctional Institution at Huntingdon. This is a general population housing unit. On that evening, at approximately 7:50 p.m., a disturbance took place in the center control area which I subsequently learned allegedly involved approximately 20 inmates. The incident was quelled and order restored within a half-hour of the incident starting. At the time it began, I was coming back from the gym along with sixty to seventy other inmates. I returned to my general population cell around 8:30 and everyone was locked in their cell on the block for the remainder of the evening. About 10:00 p.m. that same evening, I was taken from my cell in D-Block and placed in a B-Block segregation unit in Administrative custody for investigation. On the way to B-Block and while there on the evening of December 3, 1978, I received various beatings about my person as set forth in Civil Action No. 79-827, now pending before this Court. Prior to my going on B-Block, the Pennsylvania State police arrived at the institution and I was briefly interviewed by them for approximately 5 minutes.

On December 4, 1978 I received the attached Exhibit 1 charging me with Institutional misconduct of allegedly assaulting officers and conspiracy to disrupt normal institution routine by forcibly taking over the control center, in No. 90908. These charges allegedly arose out of the disturbance the evening before.

On December 8, 1978, I was merely informed by an institutional hearing committee that my disciplinary or misconduct charges in No. 90908 were continued pending completion of the investigation by the State police pursuant to administrative directive .004 and because of insufficient evidence to support the misconduct charges against me as set forth in Exhibit P-2 attached. No hearing was conducted on this date nor was an adjudication or finding made.

On December 11, 1978 I was charged criminally in alleged violation of the laws of Pennsylvania with allegedly assaulting Correctional Officer Rhodes and riot. On January 2, 1979 I was again merely informed by an Institutional Program Review Committee (PRC) which was composed of the Defendant Erhard, Henry and Mateer that my Administrative Segregation status was continued pending the completion of the State police investigation and pursuant to Administrative Directive .004. Said decision was concurred in by the Defendant Hewitt. On or about January 6, 1979, the criminal charges of assault and riot against me were dismissed.

On January 19, 1979 I was charged by the Defendant Kyler with the alleged Institutional Misconduct of allegedly assaulting Sargeant Phillips in No. 90986, arising out of the disturbance of December 3, 1978. This charge was allegedly based on information supplied by a confidential informant, as set forth in Exhibit P-3 attached.

On January 22, 1979 I was found guilty by an Institutional Hearing Committee composed of the Defendants Stotelmyer, Smith, and Hileman on the misconduct charge of assaulting Officer Phillips in No. 90986, based on the information allegedly supplied to Defendant Kyler by an alleged informant, as set forth in Exhibit P-4 attached. The misconduct charges of assault and conspiracy of December 4, 1978 as set forth in Misconduct No. 90908 were dismissed with no action having been taken on them or a violation found. At the Misconduct Hearing of January 22, 1979, the credibility, reliability and factual knowledge of the incident by the alleged informant was never confirmed as set forth in the record nor was any written statement of that person presented, despite my efforts to gain information in this regard. As a result of this disciplinary misconduct hearing, I was sentenced to six months in disciplinary custody on B-Block effective from December 3, 1978 and recommended for transfer or separation from Huntingdon which transfer permanently took place on May 30, 1979.

Since my confinement on B-Block in administrative or investigative status from December 3, 1978, I had no opportunity to have a full due process hearing where evidence and witnesses would be presented personally on my behalf and where an adjudication or finding of guilt or innocence would be made along with a written statement of the evidence relied upon and reasons for the action, until January 22, 1979. The Defendant Hewitt has on a monthly basis reviewed the decisions of the Program Review Committee of the institution and concurred in their decision to keep me in restricted or segregated status and has otherwise refused to reverse the disciplinary conviction of January 2, 1979, despite the deprivations that I have alleged herein. Any emergency conditions justifying a delay in providing

me with a due process hearing ended on the night of December 3, 1978 when the disturbance was quelled. Furthermore, the institution returned to normal routine operation within a few days of the incident and the institution was providing disciplinary or misconduct hearings the next day through and including December 22, 1978 to many other inmates in the institution.

The punishment I have received as a result of this incident has caused me irreparable harm in that it will be hard for me to attain minimum security status or transfer to a pre-release center because of this incident and it will surely affect me adversely when I see the parole board in April of next year.

This confinement for six months in segregated status caused me to lose my job which I had on December 3, 1978 working as a Plumber at the rate of 11¢ per hour for a 7 hour day, 5 days per week. While confined in segregation I had no access to vocational, educational, recreational, and rehabilitative programs as I would have had while out in the general population. Exercise was limited to between five and ten minutes a day and was often only three or four days a week. Showers were virtually nonexistent in segregation in December and January. The changing of clothes was also only once or twice a week while I could have changed more often in population. Had I been in general population I would have had access to various exercise facilities such as the gym and the yard and would have been able to do this for most of the time out of my cell which would have been approximately 14 hours a day. While in segregation I only got out of my cell a few minutes for exercise, showers and an occasional visit. I was virtually confined there 24 hours a day otherwise. I had been subject to racial slurs and constant harassment and threat-

ened with being given an institutional misconduct if I as much as talked in a normal tone.

It is my belief after conferring and communicating with counsel that a disposition of the Defendants' Motion to dismiss and/or in the Alternative Motion for Summary Judgment should be continued until such time as after an Answer is filed and the discovery process which was initiated with the Complaint is completed. More evidence to file a complete or comprehensive response and/or my own motion for Summary Judgment is needed in regard to the situation in the institution after December 3, 1978 as to whether or not the hearing could have been provided me prior to January 22, 1979. Furthermore, more evidence is needed concerning any statements by alleged informants and inquiries into their credibility, reliability and knowledge of the incident. While I am in possession of some information as to these issues, I do not feel that a complete record of facts has been developed and it is unfair to require a disposition of the Defendants' Motion at this time when Plaintiff has incomplete evidence.

Facts concerning the issues discussed herein are in possession of the defendants and will be revealed through the filing of Answers to the Complaint and Discovery.

In addition I will file requests for admissions on facts and documents which I have not had an opportunity to do.

(s) Aaron Helms
Aaron Helms

Sworn to and subscribed
before me this 11th day
of September, 1979.

(s) Nathaniel Williams
Notary Public

NATHANIEL WILLIAMS, Notary Public
GRATERFORD, MONTG. CO., PENNSYLVANIA

My Commission Expires October 1, 1979.

EXHIBIT P-1

FORM JBC-141D, PART 1

COMMONWEALTH OF PENNSYLVANIA

Department of Justice
Bureau of Correction No. 90908

X MISCONDUCT REPORT; — OTHER

BC Number, F-8321; Name, Aaron Helms; Institution, SCIH; Misconduct Time 24 Hr. Base, 1950; Misconduct Date, 12-3-78.

Quarters, D; Assignment, Plumbing Shop; Place of Misconduct

Other Inmates or Staff Involved or Witnesses (Check I or W)

BC Number; Name; I W; BC Number; Name; I W

Misconduct: Assaulting Officers and Conspiracy to Disrupt Normal Institution Routine by Forcefully Taking Over the Control Center.

Staff Member's Version: This Inmate Was a Member of an Organized Plot and Did Actively Involve Himself With at Least 10 Other Inmates in the Assault Upon 5 Corrections Officers in "C" Block and Attempted To Break Thru the "C" Grill to the Control Center To Disrupt the Normal Institution Routine by Usurping the Authority of Institution Officials.

"This is the Misconduct I Received on Dec. 4, 1978."

Immediate Action Taken and Reason: Confined to the R.H.U.

Staff Member Reporting Misconduct Signature and Title /s/ R. A. Clemons Lt.

Action Approved by Ranking C.O. on Duty Signature and Title /s/ A. Domovich C.O. III

Date and Time Inmate Given Copy: Date 12/4/78; Time 24 Hour Base 1535.

Hearing Date; Hearing Time; Location of Hearing, Hearing Room; Misconduct Category, X Class 1; — Class 2. Signature of Person Serving Notice /s/ J. S. Price.

NOTICE TO INMATE

You are scheduled for a hearing on this allegation on the date and the time indicated or as soon thereafter as possible. You may remain silent if you wish, and anything you say will be used against you both at the hearing and in a court of law if this matter is referred for criminal prosecution. If you choose to remain silent, the hearing committee may hold your silence against you, but they must have some other evidence besides your silence in order to find you guilty. If you indicate that you wish to remain silent, you will be asked no further questions.

You may be represented by another inmate of general population status or a member of the institutional staff at your hearing.

You may request witnesses who will be permitted to testify at the hearing provided they are willing, relevant and do not create a security hazard; relevancy and security will be determined by the chairman of the hearing committee.

If you wish to take advantage of either or both of these choices, please notify the chairman of the hearing committee in writing immediately on the form provided.

☒ If this block is checked and you are found guilty of the above described misconduct, the hearing committee may suspend or revoke your pre-release status.

EXHIBIT P-2

COMMONWEALTH OF PENNSYLVANIA

Department of Justice
Bureau of Correction

Form JBC-141D PART II B

HEARING COMMITTEE ACTION

☒ MISCONDUCT; ☐ OTHER

BC Number, F8321; Name, Helms, Aaron; Institution, SCIH; Misconduct Time Hr. Base, 1950; Misconduct Date, 12-3-78; No. from Part 1, 90908

Inmate Plea ☐ Not Applicable, ☐ Guilty, ☐ No Plea, ☒ Not Guilty; Hearing Committee Verdict ☐ Guilty, ☐ Not Guilty; Hearing Date, 12-8-78; Hearing Time, 1100

HEARING COMMITTEE ACTION

☐ See Appendices

☒ See JBC-141D PART IIC for Inmate Version and Witness Statements

☐ Dismiss the Charge (s) ; ☐ Reprimand; ☐ Administrative Custody-Close; ☐ Administrative Custody-Maximum; ☐ Disciplinary Custody-Close; ☐ Disciplinary Custody-Maximum; ☐ Change Living Quarters; ☐ Restriction to Quarters; ☐ Privilege Restriction (s) ; ☐ Probationary Period; ☐ Suspend Pre-release Status; ☐ Revoke Pre-release Status;☐ Change in Program; ☐ Transfer Recommendation; ☐ Other

Use space below to indicate details of fact and action taken.

No finding as to guilt reached at this time, due to insufficient information.

Continue in Restricted Housing Unit, Investigation under the provisions of Administrative Directive 004.

Review January 2, 1979, or at completion of investigation by Pa. State Police.

"I was never found Guilty on this Misconduct"

Disposition of Other Inmates Involved

Names of Hearing Committee Members and Titles: G. Willison, Acting Captain; R. Fortson, Laundry Supervisor III; B. K. Smith, Counselor III

Hearing Committee Report and All Appended Information Must be Signed. Signature Indicates Finished Report With Appendices. (s) Acting Captain Perry Williams, Signature of Hearing Committee Chairman

YES ☒ NO ☐ I have heard the decision and have been told the reason for it and what will happen.

YES ☒ NO ☐ The circumstance of the charge has been read and fully explained to me.

YES ☒ NO ☐ I have had the opportunity to have my version reported as part of the record.

YES ☒ NO ☐ I have been advised that I may, within 15 days, request a formal review, and understand that this request must contain specific reasons for the review.

(s) Illegible
Inmate's Signature

EXHIBIT P-3

COMMONWEALTH OF PENNSYLVANIA

Department of Justice
Bureau of Correction

No. 90986

Form JBC-141D PART I

☒ Misconduct Report; ☐ Other

BC Number, F-8321; Name, Helms, Aaron; Institution, SCIH; Misconduct Time 24 Hr. Base, 1950 hrs; Misconduct Date, 1-19-79

Quarters, D; Assignment, Plumbing Shop; Place of Misconduct, C Block

Other Inmates or Staff Involved or Witnesses (Check I or W)

BC Number; Name; I; W; BC Number; Name; I; W Misconduct Assault.

Staff Member's Version: Following a major disturbance on December 3, 1978, an investigation conducted by S.C.I.H. Staff and Pa. State Police produced information from confidential informants that F-8321 Helms was seen in the front of C Block during the assault and was seen striking Sgt. Phillips.

"This is the Misconduct I Received on 1/19/79"

Immediate Action Taken and Reason: Confined to R.H.U.

Staff Member Reporting Misconduct Signature and Title: (s) B. B. Kyler, CO III

Action Approved by Ranking C.O. on Duty Signature and Title: (s) A. Domovich, CO III

Date and Time Inmate Given Copy: Date, 1-19-79; Time 24 Hour Base, 1530

Hearing Date, 1/22/79; Hearing Time, 1:00 P.M.; Location of Hearing, B Block; Misconduct Category, ☒ Class 1, ☐ Class 2; Signature of Person Serving Notice: (s) Illegibile

Notice to Inmate

You are scheduled for a hearing on this allegation on the date and the time indicated or as soon thereafter as possible. You may remain silent, if you wish, and anything you say will be used against you both at the hearing and in a court of law if this matter is referred for criminal prosecution. If you choose to remain silent, the hearing committee may hold your silence against you, but they must

have some other evidence besides your silence in order to find you guilty. If you indicate that you wish to remain silent, you will be asked no further questions.

You may be represented by another inmate of general population status or a member of the institutional staff at your hearing.

You may request witnesses who will be permitted to testify at the hearing provided they are willing, relevant and do not create a security hazard; relevancy and security will be determined by the chairman of the hearing committee.

If you wish to take advantage of either or both of these choices, please notify the chairman of the hearing committee in writing immediately on the form provided.

☒ If this block is checked and you are found guilty of the above described misconduct, the hearing committee may suspend or revoke your pre-release status.

EXHIBIT P-4

COMMONWEALTH OF PENNSYLVANIA

Department of Justice
Bureau of Correction

Form JBC-141 D PART II B

Hearing Committee Action

☒ Misconduct, ☐ Other

BC Number, F-8321; Name, Helms, Aaron; Institution, S.C.I.H.; Misconduct Time 24 Hr. Base, 1950 hrs.; Misconduct Date, 1-19-79; No. from Part 1, 90986

Inmate Plea: ☐ Not Applicable, ☐ No Plea, ☐ Guilty, ☒ Not Guilty; Hearing Committee Verdict: ☒ Guilty, ☐ Not Guilty; Hearing Date, 1/22/79; Hearing Time 14:05

HEARING COMMITTEE ACTION

☐ See Appendices

☒ See JBC-141D PART IIC for Inmate Version and Witness Statements

☐ Dismiss the Charge (s); ☐ Reprimand; ☐ Administrative Custody-Close; ☐ Administrative Custody-Maximum; ☒ Disciplinary Custody-Close; ☐ Disciplinary Custody-Maximum; ☐ Change Living Quarters; ☐ Restriction to Quarters; ☐ Privilege Restriction (s); ☐ Probationary Period; ☐ Suspend Pre-release Status; ☐ Revoke Pre-release Status; ☐ Change in Program; ☒ Transfer Recommendation; ☐ Other

Use space below to indicate details of findings of fact and action taken.

Helms is found guilty of assault, based on the information provided by Lt. Kyler. The informants were not identified for their safety.

ACTION: Disciplinary Custody Close, 6 months, effective December 3, 1978. Review date 2-2-79. Recommend transfer for separation.

RATIONALE: Extremely serious misconduct, several people were injured in this incident.

NOTE: This finding and disposition concludes action on misconduct #90908, heard Dec. 8, 1978 without conclusion.

Disposition of Other Inmates Involved

Names of Hearing Committee Members and Titles: R. E. Stotelmyer, Major; B. K. Smith, Counselor III; K. R. Hileman, Farm Manager

Hearing Committee Report and All Appended Information Must be Signed. Signature Indicates Finished Report with Appendices, (s) Major R. Stotelmyer, Signature of Hearing Committee Chairman

YES ☒ NO ☐ I have heard the decision and have been told the reason for it and what will happen.

YES ☒ NO ☐ The circumstance of the charge has been read and fully explained to me.

YES ☒ NO ☐ I have had the opportunity to have my version reported as part of the record.

YES ☒ NO ☐ I have been advised that I may, within 15 days, request a formal review, and understand that this request must contain specific reasons for the review.

(s) [Illegible]
Inmate's Signature

COMMONWEALTH OF PENNSYLVANIA

Department of Justice
Bureau of Correction

Form JBC-141D PART II C

HEARING COMMITTEE SUPPLEMENT

INMATE VERSION AND WITNESS STATEMENT

BC Number, F-8321; Name, Helms, Aaron; Institution, S.C.I.H.; Misconduct Time 24 Hr. Base, 1950 hrs.; Misconduct Date, 1-19-79; No. from Part 1, 90986

VERSION AND STATEMENTS AS RECORDED BY MEMBER OF HEARING COMMITTEE

Inmate's Version: Not Guilty.

I was coming back from Gym in corridor between F & C Block. I saw a group of dudes running back towards F-Block Corridor. At that time Officer Bollinger was with us in corridor. The inmates stayed there as Officer Bollinger went towards C-block. The rest of the inmates in F-Block followed officer Bollinger to C-Block. When I got to C Block entry I saw 3 officers standing in the front of C-Block with blood on them. Sgt. Varner told everybody to stand on population (TV.) side of C Block. About 5 minutes later they started taking about 3 men at a time back to their block.

(s) Aaron Helms

Addendum—Helms related he was interviewed by Pa. State Police on Jan 3, 1979 and was advised that witnesses had seen him strike Mr. Rhodes—Helms wishes this discrepancy noted

Witnesses Name, Lt. Kyler

Statement: Confidential informants were positive in identifying Helms, and did state he was seen striking—"punched" Sgt. Phillips.

(s) B. B. Kyler CO III

PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

[Caption Omitted]

To: Francis R. Filipi
Assistant Attorney General
Pennsylvania Bureau of Correction
P. O. Box 598
Camp Hill, PA 17011

Pursuant to Federal Rule of Civil Procedure 36, Plaintiff hereby requests Defendants admit the genuineness and authenticity of the following documents, within thirty (30) days of service of said request. Documents or exhibits are described herein and attached as Exhibits.

1. A four (4) page document dated December 5, 1978 from Lowell D. Hewitt, Superintendent to C. C. Carson, Records Supervisor.

2. A document dated December 5, 1978 from Lowell D. Hewitt, Superintendent to all staff with a carbon copy to Commissioner Robinson.

3. A letter dated December 5, 1978 from Superintendent Lowell D. Hewitt to Chief Varner with carbon copies to Mayor DeForrest and Commissioner Robinson.

4. A confidential memo to Superintendents dated December 4, 1979 from William B. Robinson, Commissioner.

5. A newspaper article from the Post-Gazette dated Tuesday, December 5, 1978 and entitled "Huntingdon Prison Fight Hurts 5 Guards".

KEYSTONE LEGAL SERVICES, INC.
By: (s) Richard G. Fishman
Richard G. Fishman, Esq.
251 South Pugh Street
State College, PA 16801
Attorney for Plaintiff

Dated:
November 13, 1979

EXHIBIT 1

OA 501 1267

COMMONWEALTH OF PENNSYLVANIA
December 5, 1978

STATE CORRECTIONAL INSTITUTION
AT HUNTINGDON

F5073

SUBJECT: Major Disturbance—December 3, 1978

TO: C. C. Carson
Records Supervisor

FROM: (s) Lowell D. Hewitt
Lowell D. Hewitt, Superintendent
State Correctional Institution at Huntingdon

Please see that a copy of the attached complete packet is placed in the JBC-15 of each of the eighteen inmates listed on the first sheet.

LDH:jh
Attach:

ATTACHMENT NO. 1
STATE CORRECTIONAL INSTITUTION AT HUNTINGDON

Number & Name of Inmate Involved	Age	Date Admitted	Offense and Charge	Sentence or Detention Status
Y-0589, Galloway, Cornell	30	1-5-73	Robb w/acc. or while armed or by viol.	7½-15 Yrs.
F-8050, Jones, Robert	29	9-14-78	Murder, 1st Deg.	Life
Y-1126, Hagood, Robert	40	7-30-73	Murder, 1st Deg.	Life
F-5073, Gans, Kevin	23	4-28-76	Murder, 1st Deg.	Life
F-6347, Roberson, Gary	21	9-22-76	Robb, Rape	10-20 Yrs.
Y-2653, Fletcher, George	21	7-13-77	Robb, Burg, Theft by Unlawful Taking	2-5 Yrs.
P-2020, Reese, Donald	27	11-3-76	Criminal Attempt	8-20 Yrs.
F-8321, Helms, Aaron	26	2-22-78	Robb.	2½-6 Yrs.
F-1668, Brown, Daryl	26	2-8-74	AA&B, Agg. Robb.	1 Yr. 3 Mo.-10 Yrs.
F-7424, Howard, Larry	33	8-30-77	Agg. Robb.	4½-14 Yrs.
P-3073, Murphy, Mitchell	27	3-7-78	Robb.	6-15 Yrs.
P-3584, Caldwell, Eugene	20	9-13-78	Theft, RSP	11½-23 Mos.
R-2728, Matthews, Curtis	23	6-22-77	Agg. Asslt. on Police Officer, Escape	Indet.-5 Yrs.
F-4165, Carlos, Gregory	30	10-8-78	Murder, 2nd. Deg.	15-40 Yrs.
F-3884, Quinn, Clarence	25	3-20-75	Forc. Rape, Agg. Robb.	12-15 Yrs.
M-1145, Woodbury, Ivory	27	9-22-76	Robb., Robbery	5-20 Yrs.
K-1722, Bethea, Thomas	24	12-7-77	Robbery	8-20 Yrs.
F-0389, Gardner, Emanual	30	10-27-76	Burg. W/I Comm. Fel., Agg. Robb., Poss. F/A	10-20 Yrs.

ATTACHMENT NO. 2

STATE CORRECTIONAL INSTITUTION
AT HUNTINGDON

On December 3, 1978 at approximately 6:10 P.M. C.O.I Maskulyak, C.O.I Carolus and Lt. Clemens were in the Control Center discussing the observed irrational behavior of F-5525 Young. During the discussion, F-0389 Gardner came to the Center. He was asked by Lt. Clemens to step back while they finished discussing a situation. Gardner refused and was then ordered by Lt. Clemens to return to his block. F-0389 Gardner refused to leave the area and sat down on a bench near the officers. Lt. Clemens told Officers Maskulyak and Carolus to place F-0389 Gardner in the Restricted Housing Unit. When they approached Gardner, he attacked Officer Carolus. At this point, force (including batons) was used to place Gardner in the R.H.U. Several officers assisted in subduing Gardner who resisted and kept hitting even after restraints were placed on him. After Gardner was placed in the Disciplinary Custody Maximum section of the R.H.U., Officers Carolus and D. D. Pyles were taken to the J. C. Blair Hospital. Officer Carolus was treated for a broken nose and Officer Pyles was treated for a broken thumb. Corrections Infirmary Supervisor Cummings checked F-0389 Gardner at 6:30 P.M. and Dr. Dunn checked Gardner at 9:30 P.M. No serious injuries were reported. In addition to the aforementioned injured officers, Sgt. J. Price suffered a contusion of the left thumb.

At approximately 7:50 P.M. on December 3, 1978 a group of inmates including Daryl Brown, F-1668—Donald Reese, P-2020—Curtis Matthews, R-2728 attacked Sgt. H. Phillips and C.O. Trainee E. Rhodes. The attackers were

using table legs, the officers' flashlight, barbell weights and broken broom handles, squeegees and any other item they could find to assault these officers. At about the same time Lt. Domovich, Lt. Clemens and State Policeman L. A. Brown were under the Center discussing the earlier assault by F-0389 Gardner when they heard a disturbance upstairs. They went up and saw Murphy, P-3073, Howard, F-7421 and Caldwell, P-3584 trying to attack Sgt. Varner with a flashlight. The three inmates were forcibly subdued and handcuffed to pipes in the Control Center. Inmates in C Block were trying to break C grille to enter the Control Center, but it withstood their assault. As soon as Sgt. Phillips and Mr. Rhodes could be freed from C Block, they were rushed to J. C. Blair Hospital via ambulance. Although a complete medical report is not available, it is now reported that Officer Rhodes suffered cuts of the head and face area, as well as bruises of the body and leg areas. Sgt. H. Phillips is reported as having a possible skull fracture, broken jaw, broken teeth, injured collarbone, as well as multiple bruises of the body.

During the assault of Officers Phillips and Rhodes, C.O.I Shaffer was hit by inmates P-2020 Reese and F-1668 Brown and knocked under the stairs in front of C Block. Also Officers R. Lear and R. Itinger were attacked by F-7421 Howard and P-3073 Murphy. Both officers received minor injuries during the attack.

After the Control Center was secured, Lt. Domovich ordered the riot plan activated and within ten minutes outside help started to arrive at SCIH. Telephone, institutional whistle and radio equipment were used to alert the area and secure help to handle the disturbance. By 9:00 P.M. approximately 90 employees of SCIH had responded and were at the Institution.

Attachment No. 2 Page 2

Once the inmates were quieted in C Block, the inmates in C Block were returned to their cells and all other inmates still in C were moved three at a time to their own living quarters. The first staff arrivals were issued riot equipment and were assigned to secure all other areas of the Institution such as the gym, kitchen, chapel and powerhouse. No other blocks had inmate disturbances except D Block had one inmate, Y-2653 Fletcher, who had to be ordered several times before he would return to his cell.

After the inmates were locked in their cells a list of insurgent inmates who were involved was compiled. The list included, Y-0589 Galloway, F-8050 Jones, Y-1126 Haygood, F-5073 Gans, F-6347 Roberson, Y-2653 Fletcher, F-0389 Gardner, P-2020 Reese, F-8321 Helms, F-1668 Brown, F-7424 Howard, P-3073 Murphy, P-3584 Caldwell, R-2728 Matthews, F-4165 Carlos, F-3884 Quinn, M-1145 Woodbury and K-1722 Bethea.

Once the list was compiled, all inmates on the list were removed from their cells one at a time and moved to the R.H.U. On route to the R.H.U. each inmate had his picture taken by I.D. Officer D. M. Hess. After the picture was taken, they were taken into a room and interviewed by the Pennsylvania State Police. They then were taken to the Restricted Housing Unit and checked by Dr. Dunn and a C.I.S. and then assigned a cell in the Unit.

Several officers were held over to stay the night and several were brought in to observe the breakfast feeding. As a precaution, the morning meal was served in three set-ups instead of the normal two set-ups. After the breakfast feeding went without incident, the work lines were called and a normal schedule will be followed.

Throughout the affair, Pennsylvania State Police officers patrolled the perimeter of the institution grounds and assisted in interviewing staff and inmates to get the whole picture and to further gather information that will be used for criminal prosecution.

EXHIBIT 2

OA 501 1267

COMMONWEALTH OF PENNSYLVANIA

STATE CORRECTIONAL INSTITUTION
AT HUNTINGDON

December 5, 1978

SUBJECT: Major Disturbance—December 3, 1978

TO: All Staff

FROM: (s) Lowell D. Hewitt
Lowell D. Hewitt, Superintendent
State Correctional Institution at Huntingdon

I wish to express my heartfelt appreciation for the outstanding manner in which the staff of this Institution responded to our emergency call for help on Sunday, December 3, 1978. As a result of this call, between 90 and 100 off-duty staff reported in short order to the Institution. This type of responsiveness added very quickly to the reassurance of the on-duty staff and quickly demonstrated to the inmates a show of force and added much to the return of the Institution to its normal operation.

I think this kind of responsiveness is a reflection of the quality of professional staff that we have and for which I am very grateful.

Thank you one and all!

LDH:jh
cc: Commissioner Robinson

EXHIBIT 3

William B. Robinson
Commissioner
Bureau of Correction

Drawer R
Huntingdon, Pa. 16652
Phone 814-643-2400

COMMONWEALTH OF PENNSYLVANIA

STATE CORRECTIONAL INSTITUTION
AT HUNTINGDON

Lowell D. Hewitt
Superintendent

Address All Replies
To Superintendent

December 5, 1978

Mr. Daniel Varner
Chief of Police
Huntingdon, Pennsylvania 16652

Dear Chief Varner:

This letter is to express my deepfelt appreciation for the prompt manner in which the Huntingdon Police Department responded to our need for assistance on the night of December 3, 1978. It is reassuring to our staff that we have this type of backup support from our community law enforcement people. Further, this type of action greatly assisted us in getting the Institution back to normal routine.

Please thank your staff for the assistance they gave us in this matter.

Sincerely,
(s) Lowell D. Hewitt
Lowell D. Hewitt
Superintendent

LDH:jh
cc: Mayor DeForrest
Comm. Robinson

EXHIBIT 4

CIH048 CCO053 DEC 04 1978 11:42:34
SN CCO CIC CID CIG CIH CIM CIP CIR CFG CMR, SUPERINTENDENTS—CONFIDENTIAL

PLEASE BE INFORMED OF A SITUATION THAT OCCURRED SUNDAY EVENING AT THE STATE CORRECTIONAL INSTITUTION HUNTINGDON. APPROXIMATELY 12 INMATES ENDEAVORED THROUGH THE USE OF FORCE TO TAKE OVER THE CENTRAL CONTROL AREA. THEY WERE CONTAINED IN C BLOCK. A CONFRONTATION ENSUED—6 OFFICERS WERE INJURED. SITUATION PRESENTLY CALM. 17 SUSPECTED PARTICIPANTS ISOLATED. INSTITUTION BACK TO NORMAL AT THIS TIME. ANY ADDITIONAL INFORMATION NEEDED, CALL THIS OFFICE NOT HUNTINGDON. STAFF AND SUPERINTENDENT EXTREMELY BUSY.

AUTH: WILLIAM B. ROBINSN, COMMISSIONER
OPR/IF

EXHIBIT 5

1—POST-GAZETTE: Tues., Dec. 5, 1978

HUNTINGDON PRISON FIGHT HURTS 5 GUARDS

HUNTINGDON (AP)—Authorities described the situation at the state prison here yesterday as "orderly, but tense" following an unsuccessful attack by inmates on the institution's control center.

Five officers were hurt, including one who was hospitalized with a broken jaw and shoulder, after the brief disturbance Sunday evening, said Kenneth Robinson, public information officer for the Bureau of Corrections in Harrisburg.

"As of this morning, work lines have been sent out and the institution is running normally. State police had 30 troopers on stand-by last night, but they were not called in and only investigating officers are present today," Robinson said.

The unrest began when an inmate broke a guard's nose after he was placed in a restricted housing area Sunday afternoon, said prison liason officer Eugene Shore.

Nearly four hours later, following an open recreation period, about 12 inmates attempted to occupy the control tower located in the center of the prison, Shore said.

"They jammed the door leading from Cell Block C into the control tower with broom handles, pipes, anything they could get their hands on," said Shore.

Shore said the takeover attempt took about 30 minutes to quell.

Sgt. Harry Phillips, 40, of Altoona, was admitted to the Altoona Hospital with a broken jaw and shoulder. The others were given dispensary treatment, Shore said.

Robinson said criminal charges will be filed against about six inmates in connection with the disturbance.

CERTIFICATION OF SERVICE

I, Richard G. Fishman, Esq., hereby certify that on this 13th day of November, 1979, I sent by first class mail, postage prepaid, a true and correct copy of Plaintiff's First Request for Admissions to Francis R. Filipi, Assistant Attorney General, Pennsylvania Bureau of Correction, P. O. Box 598, Camp Hill, Pennsylvania 17011.

(s) Richard G. Fishman
Richard G. Fishman, Esq.

AMENDED COMPLAINT
[Caption Omitted]

I. INTRODUCTION

1. This is a civil action for damages and declaratory and injunctive relief by an inmate against various prison officials for an unreasonable and illegal delay in affording him various due process procedural guarantees in disciplining him for alleged misconduct and then convicting him on the basis of an alleged informant whose credibility, reliability, and factual knowledge of the incident in question was never confirmed and set forth in the record, nor was any written statement of the alleged informant presented.

II. JURISDICTION

2. The plaintiff invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343 to redress the deprivation by defendants under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges, and immunities secured directly by the Fourteenth Amendments to the United States Constitution and under Title 42 U.S.C. §1983. Plaintiff's request for declaratory relief is authorized by 28 U.S.C. §2201, 2202 and Rule 57 of the F.R. Civ. P.

III. PARTIES

3. Plaintiff is an adult individual who at all times relevant herein was incarcerated at the State Correctional Institution (hereinafter SCI) at Huntingdon, but is presently incarcerated at SCI Graterford.

4. Defendant Lowell D. Hewitt was at all times relevant herein employed as Superintendent of SCI Hunting-

don by the Pennsylvania Department of Justice, Bureau of Correction. In such capacity it is his function to govern and manage SCI Huntingdon on a day to day basis and assume responsibility of its internal affairs and operations as well as safekeeping, discipline and employment of inmates of said institution, including but not necessarily limited to the duties and functions set forth at 71 P.S. §304, 306; 61 P.S. §650 and 37 Pa. Code §95.103(h) (7); 8 Pa. B. 2686. He is sued in his official and individual capacities.

5. Defendants Kyler, Stotelmyer, Smith, Hileman, Erhard, Henry and Mateer were at all times relevant herein employed as correctional officers or civilian employees at SCI Huntingdon by the Pennsylvania Department of Justice, Bureau of Correction. They were employed at the ranks or job titles set forth in the caption to the Complaint. They are sued in their official and individual capacities.

IV. STATEMENT OF FACTS

6. On December 3, 1978 at approximately 7:50 p.m., a disturbance broke out at SCI Huntingdon which resulted in the injury of several correctional officers and inmates and said disturbance was quelled or order restored that same evening.

7. All inmates in the institution were confined to their cells the remainder of the evening on December 3, 1978. The general inmate population was released from confinement in their cells on December 4, 1978.

8. As a result of this incident of December 3, 1978, the Commonwealth of Pennsylvania and its agents, servants, and employees, including the State Police, Bureau of Correction and the Defendants and their agents, ser-

vants, and employees began an investigation of various inmates, including the plaintiff in order to determine whether there was evidence of violation of the criminal laws of this state or misconduct regulations of the Bureau of Correction by the Plaintiff and other inmates allegedly involved in the disturbance.

9. On December 3, 1978 at approximately 10:00 p.m., plaintiff was placed in administrative close or maximum custody on B Block at SCI Huntingdon, pending investigation for alleged involvement in the disturbance of that evening.

10. On December 4, 1978 at approximately 3:35 p.m. plaintiff received an institutional misconduct for allegedly conspiring to riot and disrupt normal institutional routine by forcefully taking over the control room and assaulting correctional officers which included Officer Rhodes, as a result of the institutional disturbance the day before.

11. On December 8, 1978, plaintiff was informed by an institutional hearing committee that his disciplinary case and confinement status was continued pending completion of the investigation by the state police pursuant to administrative directive .004 and because of insufficient evidence to support the misconduct charges against him.

12. On December 11, 1978 plaintiff was charged criminally in alleged violation of the laws of Pennsylvania, with assaulting correctional officer Rhodes and riot.

13. On or about January 2, 1979, plaintiff was informed by an institutional program review committee which was composed of the defendants Erhard, Henry and Mateer that his restricted confinement status was continued

pending the completion of the state police investigation and pursuant to administrative directive .004. Said decision was concurred in by the defendant Hewitt.

14. On or about January 6, 1979 the criminal charges of assault and riot against plaintiff were dismissed and on or before this date the criminal investigation of plaintiff was completed by the Commonwealth of Pennsylvania and its agents, servants and employees.

15. On January 19, 1979, the plaintiff was charged by defendant Kyler with the institutional misconduct of assault on Sgt. Phillips arising out of the disturbance of December 3, 1978. Said charge was allegedly based on information supplied by a confidential informant.

16. On January 22, 1979 plaintiff was found guilty by an institutional hearing committee composed of the defendants Stotelmyer, Smith and Hileman on the misconduct charge of assaulting Sgt. Phillips based on information allegedly supplied to the defendant Kyler by an alleged informant. The misconduct charges of assault and conspiracy of December 4, 1978 were dismissed with no action having been taken on them or a violation found.

17. At the misconduct hearing of January 22, 1979, the credibility, reliability and factual knowledge of the incident by the alleged informant was never confirmed and set forth in the record, nor was any written statement of the alleged informant presented.

18. The plaintiff was sentenced on January 22, 1979 to six (6) months in disciplinary close custody by the hearing committee effective from December 3, 1978 and recommended for transfer for separation from SCI Huntingdon which transfer has since taken place.

19. The action of the institutional hearing committee of January 22, 1979 was the first adjudication or finding of plaintiff's alleged misconduct arising out of the institutional disturbance of December 3, 1978, even though he had been confined in restrictive close or maximum custody since that date and the emergency created by the disturbance had ended on or before December 12, 1978.

20. The defendant Hewitt has on a monthly basis reviewed the decisions of the program review committee of the institution and concurred in their decisions to keep plaintiff in restrictive close or maximum custody and recommend his transfer and he has otherwise refused to reverse plaintiff's disciplinary conviction of January 22, 1979.

21. The plaintiff has suffered immediate and irreparable harm from the misconduct convictions set forth in this complaint as to obtaining a minimum classification, pre-release and parole and has suffered immediate and irreparable harm from the debilitating conditions while confined in restrictive close or maximum custody including but not necessarily limited to a lack of participation in vocational, educational and rehabilitative programs or facilities, a lack of exercise and almost constant harassment.

22. Defendants have at all times relevant herein, acted maliciously, wantonly, and with reckless disregard of the clearly established rights of the plaintiff.

V. CAUSES OF ACTION

23. The continuation of plaintiff in close or maximum custody for over ten (10) days without a prior finding of a misconduct or behavioral violation violated 37 Pa. Code §95.104 (b) (3), 8 Pa. B. 2687 and thus denied plain-

tiff due process of law in the defendants failure to follow their own regulations as guaranteed directly by the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. §1983.

24. The failure to hold a due process disciplinary hearing or convict plaintiff of misconduct charges arising out of the disturbance of December 3, 1978 until January 22, 1979 denies plaintiff due process of law as guaranteed directly by the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. §1983.

25. The use of alleged informant's information to convict plaintiff of misconduct as set forth in this Complaint violates principles of fundamental fairness as guaranteed directly by the due process clauses of the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. §1983.

WHEREFORE, plaintiff prays this Honorable Court:

1. Enter a declaratory judgment, declaring plaintiff's rights under the Fourteenth Amendment and 42 U.S.C. §1983 violated as more specifically set forth in this Complaint.

2. Enter a permanent injunction enjoining and restraining the defendants from confining plaintiff in restrictive custody of any kind as a direct or indirect result of the institutional disturbance at SCI Huntingdon on December 3, 1978 and ordering plaintiff returned to the custody status he enjoyed before December 3, 1978.

3. Order the reversal of the disciplinary conviction set forth in this Complaint and order it expunged from plaintiff's inmate, institutional and Bureau of Correction records.

4. Permit plaintiff to proceed in forma pauperis.

5. Award plaintiff's counsel costs and attorney's fees pursuant to 42 U.S.C. §1988.

6. Enter judgment in plaintiff's favor and against defendants for monetary relief, including compensatory and punitive damages.

7. Enter such other relief as may be necessary and proper.

(s) Richard G. Fishman
Richard G. Fishman, Esq.
Keystone Legal Services, Inc.
251 South Pugh Street
State College, PA 16801
814/238-4958

CERTIFICATION OF SERVICE

I, Richard G. Fishman, Esq., hereby certify that on this 5th day of December, 1979, I sent a true and correct copy of Plaintiff's Amended Complaint to Francis R. Filipi, Assistant Attorney General, Pennsylvania Bureau of Correction, P. O. Box 598, Camp Hill, PA 17011 by first class mail, postage prepaid.

(s) Richard G. Fishman
Richard G. Fishman

PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSIONS

[Caption Omitted]

Pursuant to Federal Rule of Civil Procedure 36, Plaintiff hereby requests Defendants admit the truth of the following statements within thirty (30) days of service of said request.

1. Disregarding or not considering the Plaintiff, prior to January 22, 1979, Defendants claim to have provided misconduct or disciplinary hearings arising out of the Institutional disturbance of December 3, 1978 and resulting Hearing Committee actions, adjudications or findings of guilt or innocence for the following listed individuals on the following dates:

F-5433 Darrell Wilson	—1-22-79	
M-1145 Ivory Woodbury	—12-8-78	(1-22-79)
F-6969 Anthony Roberson	—12-8-79	
Y-1126 Robert Hagood	—12-8-78	(1-22-79)
F-5073 Kevin Gans	—12-8-78	(1-22-79)
F-6269 Leonard Edwards	—2-2-79,	12-29-78
K-4001 Ronald Townes	—1-22-79	
F-4165 Gregory Carlos	—12-8-78	
K-1722 Thomas Bethea	—12-11-78	
F-3884 Clarence Quinn	—12-7-78	
Y-0589 Cornell Galloway	—(1-22-79)	12-8-78
R-2728 Curtis Matthews	—12-11-78	
F-8050 Robert Jones	—12-11-78,	1-22-79
Y-2653 George Fletcher	—12-11-78	
F-1668 Daryl Brown	—12-7-78	

F-7424	Larry Howard	—12-7-78
P-2020	Donald Reese	—12-7-78
F-6630	Lavoisy Collins	—12-11-78
P-3584	Eugene Caldwell	—12-7-78
P-3073	Mitchell Murphy	—12-7-78

2. From the period December 3, 1978 to and including January 21, 1979, Defendants claim to have provided misconduct or disciplinary hearings resulting in Hearing Committee adjudications, findings, or actions of guilt or innocence at SCI-Huntingdon in the numbers listed below for each day of the period of time set forth in this Admission:

December	3—0	January	1—0
	4—4		2—10
	5—4		3—9
	6—7		4—4
	7—11		5—3
	8—2		6—0
	9—0		7—0
	10—0		8—10
	11—23		9—6
	12—12		10—5
	13—9		11—4
	14—8		12—3
	15—0		13—0
	16—0		14—0
	17—0		15—0
	18—10		16—9
	19—7		17—10
	20—6		18—8
	21—0		19—4
	22—6		20—0
	23—0		21—0

24—0
25—0
26—0
27—9
28—6
29—6
30—0
31—0

(s) Richard G. Fishman
Richard G. Fishman, Esq.
Attorney for Plaintiff
Keystone Legal Services, Inc.
251 South Pugh Street
State College, PA 16801

CERTIFICATION OF SERVICE

I, Richard G. Fishman, Esq., hereby certify that on this 12 day of December, 1979, I sent a true and correct copy of Plaintiff's Second Set of Requests for Admissions to Francis R. Filipi, Assistant Attorney General, Pennsylvania Bureau of Correction, P. O. Box 598, Camp Hill, Pennsylvania 17011, by first class mail, postage pre-paid.

(s) Richard G. Fishman
Richard G. Fishman, Esq.

ANSWER TO AMENDED COMPLAINT
[Caption Omitted]

Defendants, by their attorneys, Francis R. Filipi, Assistant Attorney General and Edward G. Biester, Jr., Attorney General, answer the amended complaint as follows:

I. *Introduction.*

1. No response is necessary in that the allegation is a conclusion of law and fact.

II. *Jurisdiction.*

2. No response is necessary in that the jurisdictional statement is a conclusion of law.

III. *Parties.*

3. Admitted.

4. Admitted that during all times relevant Lowell D. Hewitt was the Superintendent at the State Correctional Institution at Huntingdon and that in this capacity he did manage that institution. No further response is necessary in that the remainder is a conclusion of law.

5. Admitted that all individuals named are employes of the Bureau of Correction and held positions and titles supplied in the caption during the relevant period of time. Denied that defendants Stotelmyer and Erhard continue to hold the positions indicated.

IV. *Statement of Facts.*

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Denied that the misconduct charged plaintiff with assaulting Officer Rhodes. The remainder is admitted although the exact time of receipt of the misconduct is stated as 3:30 p.m.

11. Admitted that the hearing committee was not supplied with sufficient evidence to dispose of the case one way or the other; denied is the characterization and implication that only further evidence to convict was being sought by the committee.

12. Admitted.

13. Admitted.

14. Admitted that the criminal charges were dropped; denied that this concluded the administrative investigation conducted by the institution and its employes.

15. Admitted.

16. Denied that the earlier charges of assault were dismissed.

17. Admitted that plaintiff was not provided with a copy of the informant's statement; denied that a synopsis of informant's information was not entered into the record and that credibility, reliability and factual knowledge were not determined by the hearing committee.

18. Admitted.

19. Admitted that January 22, 1979 adjudication was first adjudication and that he had been confined in close custody since December 3, 1978. No further response is necessary in that it is a conclusion of fact.

20. Denied that from and after plaintiff's transfer from the State Correctional Institution at Huntingdon that Superintendent Hewitt has reviewed any decisions regarding plaintiff.

21. Denied that plaintiff suffers from debilitating conditions, lack of vocational, educational and rehabilitative programs, a lack of exercise and harassment. No further response is necessary in that the remainder of the allegation is a conclusion of fact.

22. Denied that defendants have acted maliciously, wantonly or with reckless disregard of clearly established rights of plaintiff.

V. *Causes of Action.*

23. No response is necessary in that the allegation is a conclusion of fact and law.

24. No response is necessary in that the allegation is a conclusion of law.

25. No response is necessary in that the allegation is a conclusion of law.

1. Denied that plaintiff is entitled to the relief requested.

2. Denied that plaintiff is entitled to the relief requested.

3. Denied that plaintiff is entitled to the relief requested.

4. Denied that plaintiff is entitled to the relief requested.

5. Denied that plaintiff is entitled to the relief requested.

6. Denied that plaintiff is entitled to the relief requested.

7. Denied that plaintiff is entitled to the relief requested.

FIRST AFFIRMATIVE DEFENSE

The theory of respondeat superior is inapplicable to assert liability in an action filed under the Civil Rights Act of 1871 (42 U.S.C. §1983, *et seq.*).

SECOND AFFIRMATIVE DEFENSE

The defendants are immune from financial liability for the good faith performance of their ministerial duties and exercise of discretion.

THIRD AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

Respectfully submitted,

(s) Francis R. Filipi
FRANCIS R. FILIPI
Assistant Attorney General
EDWARD G. BIESTER, JR.
Attorney General

Dated: December 17, 1979
P. O. Box 598
Camp Hill, PA 17011
(717) 787-1147

CERTIFICATE OF SERVICE

I, Francis R. Filipi, Assistant Attorney General, hereby certify that I have served the foregoing Answer to Amended Complaint upon counsel for the plaintiff by placing a true and correct copy of said document in the United States Mail, postage prepaid, addressed as follows:

Richard G. Fishman, Esquire
Keystone Legal Services, Inc.
251 South Pough Street
State College, PA 16801

(s) Francis R. Filipi
Francis R. Filipi
Assistant Attorney General

Dated: December 17, 1979
P. O. Box 598
Camp Hill, PA 17011
(717) 787-1147

DEFENDANTS' RESPONSE TO PLAINTIFF'S
FIRST REQUEST FOR ADMISSIONS
[Caption Omitted]

Defendants, by their attorneys, Francis R. Filipi, Assistant Attorney General and Edward G. Biester, Jr., Attorney General, admit the genuineness of the documents appended to plaintiff's first request for admissions. Defendants reserve the right to object to their admission at time of trial on the grounds of relevancy, hearsay and any other objections that may be raised in accordance with the Rules of Evidence.

Submitted,
(s) Francis R. Filipi
FRANCIS R. FILIPI
Assistant Attorney General
EDWARD G. BIESTER, JR.
Attorney General

Dated: December 17, 1979
P. O. Box 598
Camp Hill, PA 17011
(717) 787-1147

CERTIFICATE OF SERVICE

I, Francis R. Filipi, Assistant Attorney General, hereby certify that I have served the foregoing Response to Plaintiff's First Request for Admissions upon counsel for the plaintiff by placing a true and correct copy of said document in the United States Postal System, postage prepaid, addressed as follows:

Richard G. Fishman, Esquire
Keystone Legal Services, Inc.
251 South Pough Street
State College, PA 16801

(s) Francis R. Filipi
FRANCIS R. FILIPI
Assistant Attorney General

Dated: December 17, 1979
P. O. Box 598
Camp Hill, PA 17011
(717) 787-1147

DEFENDANTS' RESPONSE TO PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSIONS

[Caption Omitted]

Defendants, by their attorneys, Francis R. Filipi, Assistant Attorney General and Edward G. Biester, Jr., Attorney General, admit the truth of the two numbered statements supplied by plaintiff's counsel dated December 12, 1979 and received by defendants' counsel on December 17, 1979.

Defendants reserve the right to object to their admission at the time of trial on the ground of relevancy and any other objection that may be raised in accordance with the Rules of Evidence.

Submitted,
(s) Francis R. Filipi
FRANCIS R. FILIPI
Assistant Attorney General
EDWARD G. BIESTER, JR.
Attorney General

Dated: January 16, 1980
P. O. Box 598
Camp Hill, PA 17011
(717) 787-1147

CERTIFICATE OF SERVICE

I, Francis R. Filipi, Assistant Attorney General, hereby certify that I have served the foregoing Response to Plaintiff's Second Set of Requests for Admissions upon counsel for the plaintiff by placing a true and correct copy of said document in the United States Postal System, postage prepaid, addressed as follows:

Richard G. Fishman, Esquire
Keystone Legal Services, Inc.
251 South Pough Street
State College, PA 16801

(s) Francis R. Filipi
FRANCIS R. FILIPI
Assistant Attorney General

Dated: January 16, 1980
P. O. Box 598
Camp Hill, PA 17011
(717) 787-1147

AMENDED ANSWER TO AMENDED COMPLAINT

[Caption Omitted]

Defendants, by their attorneys, Francis R. Filipi, Deputy Attorney General, and Harvey Bartle, III, Acting Attorney General, pursuant to Rule 15(a), with the written consent of the adverse party, amend the Answer filed December 17, 1979 on behalf of all defendants by amending paragraph 14 to read as follows:

14. Admitted that the criminal charges were ultimately dismissed; denied that this occurred on or about January 6, 1979 rather, this occurred at the preliminary hearing held on February 6, 1979. Denied that on or before January 6, 1979 the criminal investigation of plaintiff had been completed by the Commonwealth of Pennsylvania, its agents, servants and employees.

Respectfully submitted,

(s) Francis R. Filipi
FRANCIS R. FILIPI
Deputy Attorney General
HARVEY BARTLE, III
Acting Attorney General

Department of Justice
Room 1512 Strawberry Square
Harristown Bldg. No. 1
Harrisburg, Pa. 17120
(717) 787-4591
Dated: May 26, 1980

ADVERSE PARTIES WRITTEN CONSENT
TO AMENDMENT
[Caption Omitted]

I, Richard G. Fishman, hereby certify that I represent the plaintiff in this action, and that there are no other parties whose interest are adverse to defendants and that this document witnesses that I consent to the amendment to the defendants' Answer filed December 17, 1979 as provided by the foregoing document.

(s) Richard G. Fishman
Richard G. Fishman
Attorney for Plaintiff

Dated: May 26, 1980

MOTION OF PLAINTIFF FOR
SUMMARY JUDGMENT

---

* * * *

FORM JBC-14

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
Bureau of Correction

CUMULATIVE ADJUSTMENT RECORD
SCIH

Institution

Institutional Number, F-8321; PBP Number; Name, Helms

Date, Observation

22 Jan. '79—Hearing Committee
Misconduct No. 90986—Class I
Charge Assault
Action 6 months DC Close—from Dec. 3, 1978
Review Feb. 2, '79
Recommend Transfer for Separation

(s) B. K. Smith, CCS

1/26/79—Program Review Committee
Case Review

(s) DRE

2-1-79—B.A.T. Report

Both A.M. & P.M. officers recommend Helms remain in present status. Charges are pending and Helms continues to be a noise problem.

2/2/79—PRC—Personal Review

—He is being charged by the Pa. State Police in regards to his participation in the 12/3/78 incident.

—Confidential informant placed him at scene and also identified him as one who assaulted Sgt. Phillips.

—Continue current status. Personal Reveiw 3/2/79

(s) W. J. Koah
(s) T. W. Henry
(s) R. E. Hafyot

2/7/79—Program Review Committee

Case Review (s) DRE

CROSS MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

* * * *

Commonwealth of Pennsylvania CA 79-950
County of Cumberland (M.D. of Pa.)

AFFIDAVIT

I, Robert N. Best, being duly sworn according to law depose and state that I am employed by the Bureau of Correction of the Commonwealth of Pennsylvania in the capacity of Corrections Records Supervisor. I am so employed at the Central Office of the Bureau of Correction. Under my control are records routinely maintained which record the date and place of each inmate's release from custody. In this regard, these records show that Aaron Helms, F-8321, was released to parole on February 20, 1980 from the State Correctional Institution at Graterford. Mr. Helms was serving a sentence of 2 years 6 months to 6 years, actually served 3 years, 4 months and 9 days prior to his release. The foregoing information is true and correct and is supplied from the official records of the Bureau of Correction.

(s) Robert N. Best
Robert N. Best

Sworn to and subscribed to before me this 23rd day of May, A.D. 1980.

(s) David L. Gearhart
DAVID L. GEARHART, NOTARY PUBLIC
Lower Allen Twp., Cumberland County

My Commission Expires Feb. 14, 1981

Member, Pennsylvania Association of Notaries

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AFFIDAVIT

Commonwealth of Pennsylvania
County of Huntingdon

I, Buddy B. Kyler, being duly sworn according to law depose and state that I am employed by the State Correctional Institution at Huntingdon and during the relevant period of time, functioned as the Security Lieutenant for the Institution. Furthermore, in that capacity the following information is from my personal knowledge:

The primary focus of my action regarding the December 3, 1978 incident was internal investigation and to function as liaison person to assist the State Police in their criminal investigation. In regard to plaintiff, I attended the preliminary hearing on the criminal matter which was initiated on January 10, 1979 and which was continued and later rescheduled for February 6, 1979. By the date originally scheduled for the preliminary hearing, I had already received my inmate informant's notorized statement dated and notorized January 4, 1979. This notorized statement contained specific information that plaintiff had assaulted

Sergeant Phillips by striking him which resulted in Sergeant Phillips' being knocked to the floor. No action was taken by me to write a misconduct at that time because I understood that the outstanding criminal charges should be completed through the preliminary hearing stage before any administrative action was taken in order to avoid an adverse effect on the criminal process. In addition, more information could have come to light at the preliminary hearing revealing additional acts of assault or institutional misconduct by plaintiff which should be handled at a single administrative hearing.

I did not write the original misconduct charge received by plaintiff on December 4, 1978 and was not involved in its preparation or the decision of placement of plaintiff. My first and only misconduct which I wrote

Buddy B. Kyler Affidavit Page 2

concerning the plaintiff and this incident was on January 19, 1979. That misconduct charge was written because the Assistant Attorney General for the Bureau of Correction had recommended that any outstanding misconduct charges should be written and disposed of even though the preliminary hearing had not been concluded based upon the information already available to the Institution. Therefore, my efforts in regard to plaintiff's misconduct charge were taken upon legal advice and with the intent of assuring that plaintiff's constitutional due process rights were protected. The hearing on my misconduct charge was handled on January 22, 1979. At that hearing, I relayed to the committee the information supplied by the confidential informant. I did not disclose the name of the informant for various security reasons. These reasons included:

1. Concern for the safety of the informant through the additional broadcast of his identity which could occur inadvertently by this disclosure.

2. The fact that informants are very wary of the possibility of the needless disclosure of their identity which might easily result in a source of informant drying up.

Prior to my writing of the misconduct charge against plaintiff, I concluded that my confidential informant had actual knowledge of the incident, being in a location which would have made him privy to the incident and that through the corroboration of staff and other individuals regarding other incidents which he relayed that he was reliable and credible. If I had felt that the informant was not reliable, credible and had not witnessed the incident of which he gave information, I would not have written the misconduct.

The foregoing information is true and correct and based upon my personal knowledge.

Sworn and Subscribed
to this 24th day of May 1980

(s) Donald M. Hess
Notary Public

(s) Buddy B. Kyler
Buddy B. Kyler

Opposition

RECEIVED
OCT 26 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-638

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

LOWELL D. HEWITT, Superintendent; B.B. KYLER, C.O. III; R. E. STOTELMYER, Major; B. K. SMITH, Counselor III; K. R. HILEMAN, Farm Manager; D. R. ERHARD, Deputy Superintendent for Treatment; T. W. HENRY, Director or Treatment; W. W. MATEER, C.I. Manager; SCI-HUNTINGDON,

Petitioners

v.

AARON HELMS,

Respondent

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD G. FISHMAN
Keystone Legal Services, Inc.
251 South Pugh Street
State College, PA. 16801
814/238-4958

Attorney for Respondent

QUESTIONS PRESENTED

1. Is this case ripe for review when the United States Court of Appeals for the Third Circuit has remanded this matter for factual and other determinations that would obviate the necessity of this Court to decide the issues presented to it by Petitioners?

2. Is an inmate of a Correctional Institution, who is transferred from the general prison popula ion to administrative segregation, charged with a disciplinary rule violation and held in investigative status without a hearing for 51 days entitled to the procedural due process guarantees of Wolff v. McDonnell, 418 U.S. 538 (1974) and Hughes v. Rowe, U.S. , 101 S.Ct. 173 (1980).

3. Did the United States Court of Appeals for the Third Circuit follow the dictates of this Court in determining whether any state created liberty interests or entitlements were present and what process was due an inmate transferred from the general prison population to administrative custody, pending investigation of disciplinary charges against him?

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STATUTE INVOLVED

The Civil Rights of Institutionalized Persons Act, 42 U.S.C.A. §§1997-1997j, is reprinted in the Appendix of Respondent due to its length.

REGULATIONS INVOLVED

37 Pa. Code §§93, 95 (Preamble), 8 Pa.B. 2682 (September 12, 1978):

> The Department of Justice, Bureau of Correction, under authority contained in §1 of the act of April 23, 1829 (P.L. 341) as amended (61 P.S. §346) by this order amends its procedures on inmate correspondence, disciplinary custody and restrictive housing, inmates' incoming correspondence and inmate visiting privileges, establishes procedures for searches of inmates and cells, use of force and restraints, guest speakers and basic issue for inmates and revokes the mental health transfer procedure, 37 Pa. Code §§95.81.95.87 in their entirety, as set forth in Annex A to this order, to be effective on October 1, 1978.
>
> The purpose of this order is to bring the Bureau of Correction's above-mentioned regulations into compliance with the Consent Decree entered as modified by order of Judge Joseph S. Lord, III, on May 22, 1978 in the case captioned I.C.U. v. Shapp, C. A. 70-3054 (E.D.Pa.).
>
> . . .

37 Pa. Code §95.7. After arrival of State Police.

> After the State Police have arrived at the institution in response to a request by the superintendent, the institution shall comply with the following provisions:
>
> . . . .
>
> (4) Upon completion of the investigation, the State Police investigators shall informally report the findings of their investigation to the superintendent, prior to the filing of any criminal complaint, but the determination as to the specific charges to be filed, if any, shall be the responsibility of the State Police. All complaints shall be signed and filed by the State Police, except that prosecutions for escape or class 2 offenses shall be signed and filed by Bureau personnel.

37 Pa. Code §95.103. Procedures.

> . . . .
>
> (d) The procedure for handling misconducts shall be as follows:
>
> (1) The inmate shall be informed in writing of the charge and given a specific date for a hearing which shall be held not less than 24 hours after receipt of this notice but within sixty days.

37 Pa. Code §95.104. Behavior control and confinement.

. . . .

(b) Individual. Individual behavior control and confinement shall conform with the following:

(1) An inmate who has allegedly committed a Class 1 Misconduct may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution, not routinely but based upon his assessment of the situation and the need for control pending application of procedures under §95.103 of this title (relating to procedures).

. . . .

(3) An inmate may be temporarily confined to Close or Maximum Administrative Custody in an investigative status upon approval of the officer in charge of the institution where it has been determined there is a threat of a serious disturbance, or a serious threat to the individual or others. The inmate shall be notified in writing as soon as possible that he is under investigation and that he will receive a hearing if any disciplinary action is being considered after the investigation is completed. An investigation shall begin immediately to determine whether or not a behavior violation has occurred. If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated but in all cases within ten days.

. . . .

37 Pa. Code §95.107. Care and treatment.

(a) Administrative Custody housing shall be designated as Close and Maximum and will be specified groups of cells in a designated section or sections of the institution as the physical plant permits.

(1) The purpose of placing an inmate in this unit shall be to maintain the safety of the institution by segregating an individual who poses a threat to other inmates, to staff, or to himself, poses an escape risk, or needs protection from other inmates. The decision to place an inmate in this custody must comply with §95.103(g)(4) of this title (relating to procedures), or §§95.104(b)(1), (3), or (4). Determination of whether Close or Maximum Administrative Custody is necessary will be made by the Program Review Committee.

STATEMENT OF CASE

The Plaintiff-Respondent, Aaron Helms, was at all times relevant to this action incarcerated at the State Correctional Institution (SCI) at Huntingdon.

On December 3, 1978 at approximately 7:50 p.m , a disturbance broke out at SCI Huntingdon which resulted in the injury of several correctional officers and inmates, which disturbance was quelled or order restored that same evening. The State Police arrived at the Institution on December 3, 1978. The entire inmate population was then confined to their cells the remainder of the evening but the general inmate population (those not in segregation or restrictive custody on B-Block) were released from confinement in their cells on December 4, 1978. An investigation was begun to see if any misconduct (disciplinary) regulations or criminal laws were violated, by the Bureau of Correction and State Police.

The exhibits attached to Mr. Helms' First Set of Requests for Admissions indicated, according to internal documents and statements of the Superintendent Petitioner Hewitt, Commissioner William B. Robinson and the Bureau of Correction itself, that the Institution apparently returned to normal by December 5, 1978 at the latest.

On December 3, 1978 at approximately 10:00 p.m., Helms was placed in administrative maximum custody on B-Block at SCI Huntingdon after questioning by the Pennsylvania State Police, pending investigation for alleged involvement in the disturbance that evening. The following day Helms was charged with an Institutional misconduct (No. 90908) for allegedly assaulting officers (which included Officer Rhodes,

although his name is not set forth in the misconduct report) and conspiracy to disrupt normal Institution routine by forcibly taking over the control center.

On December 8, 1978, Helms was merely informed by an Institutional Hearing Committee (HC) that his disciplinary case and confinement status was continued. At this time there was insufficient evidence to support the misconduct charges against him.

On December 11, 1978, Helms was charged criminally in alleged violation of the laws of Pennsylvania, with assaulting correctional officer Rhodes and riot, which charges were subsequently dismissed. On or about January 2, 1979, Plaintiff was again merely informed by an Institutional Program Review Committee, which was composed of the Petitioners Erhard, Henry and Mateer that his restricted confinement status was continued pending the completion of the State Police investigation.

On January 19, 1979, the Respondent was charged by Petitioner Kyler with the Institutional misconduct of assault, on Sgt. Phillips in No. 90986 arising out of the disturbance of December 3, 1978.

On January 22, 1979, Helms was found guilty by an Institutional HC on No. 90986, composed of the Petitioner prison officials Stotelmyer, Smith and Hileman on the misconduct charge of assaulting Sgt. Phillips. The misconduct charges of assault and conspiracy of December 4, 1978, in No. 90908 were dismissed with no action having been taken on them or a violation found. Mr. Helms was sentenced on January 22, 1979 to six months in disciplinary custody or segregation effective from December 3, 1978.

The action of the Institutional HC of January 22, 1979 was the first adjudication or finding of Mr. Helms' alleged misconduct arising out of the Institutional disturbance of

December 3, 1978, even though he had been confined in restrictive segregated custody since that date (51 days without a hearing). Consequently, January 22, 1979 was the first opportunity for inmate Helms to have a full due process hearing where evidence and witnesses could be presented in his defense and where he would receive a written statement by the fact-finder as to the evidence relied upon and the reasons for the action taken.

The conditions of administrative segregation are virtually identical with those of disciplinary segregation and required Helms to remain in his cell about 23-1/2 hours a day with virtually no access to vocational, educational, recreational or rehabilitative programming or a job.

Among the various regulations of the Defendants concerning administrative custody, considered by the Court of Appeals, it should be noted that one provided for a due process hearing within six (6) days of receipt of the notice of disciplinary charges. 37 Pa. Code §95.103(d)(1). Another regulation for an inmate placed in investigative status as a result of a disturbance, as was Mr. Helms, provided that "If no behavior violation has occurred, the inmate must be released as soon as the reasons for the security has abated, but in all cases within ten days." 37 Pa. Code §95.104(b)(3).

Another administrative regulation at issue provided "Upon completion of the investigation, the State Police investigators shall informally report the findings of their investigation to the Superintendent [Petitioner Hewitt], prior to the filing of any criminal complaint, . . ." BC ADM. .004 ¶IV C.4. codified in 37 Pa. Code §95.7(4).

In reversing and remanding the decision of the District Court, the United States Court of Appeals for the Third Circuit

analyzed the various regulations of the Defendants under the principles set forth in Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976); Wright v. Enomoto, 462 F.Supp. 397 (N.D.Cal. 1976), aff'd 434 U.S. 1052 (1978); and Vitek v. Jones, 445 U.S. 480 (1980), and other cases. 11a-20a. ("a" refers to the Appendix to the Petition for a Writ of Certiorari). The Third Circuit based its decision on a finding of State created liberty interests or entitlements under Defendants regulations and not as a result of the Constitution of the United States itself. 14a-15a.

The Defendant prison officials contended on appeal that on December 8, 1978, they provided Mr. Helms with any necessary hearing or procedural due process concerning his administrative confinement in accord with Wolff v. McDonnell, 418 U.S. 539 (1974). 27a. Since there was a factual dispute on this question, the Court of Appeals remanded on this issue and to see if there was any possibility of a non-judicial solution to the case pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C.A. §§1997-1997j;(Supp. 1981). 34a, n.15.

SUMMARY OF ARGUMENT

It is Respondent's position that this case is not ripe for review because of the remand requiring a factual determination whether or not Petitioners provided Respondent with the procedural due process they now challenge and for which they claimed to have provided in the Court below. The case is also not ripe because of the question on remand of a non-judicial solution to the case.

Respondent also believes that prior decisions of this Court concerning State created rights, administrative custody and segregated confinement, prior to a disciplinary hearing were thoroughly reviewed by the United States Court of Appeals for the Third Circuit. The questions presented for review by Petitioners are not novel and do not justify issuance of a Writ of Certiorari. Furthermore, no split among the Circuit Courts of Appeals exists.

ARGUMENT

A. THE PROCEDURAL POSTURE OF THIS CASE MAKES IT IMPROVIDENT TO GRANT THE WRIT OF CERTIORARI

Assuming arguendo, that factors are present otherwise justifying the granting of the Writ, a careful review of the record reveals that this case is not procedurally ripe for a determination by this Court. Burrell v. McCray, 426 U.S. 471 (1976); Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 183 (1959).

Petitioners have argued in the Court of Appeals that they provided Respondent with the procedural guarantees they now seek this Court to review. 27a. Depending on the result of the remand, these prison officials may not be found liable and to have fully complied with constitutional mandates. 28a. Thus, it would not even be necessary for this Court to reach the issues presented to it.

In Brotherhood of Locomotive Firemen and Engineermen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967), the Court was asked to review the decision of the Court of Appeals for the District of Columbia. 380 F.2d 570 (D.C.Cir. 1967). The Court of Appeals had decided various legal issues concerning contempt of its injunctive orders, adverse to the Defendant union, which was contesting work rules. However, the Circuit Court remanded on the factual issues as to whether or not a contempt had actually been committed. Certiorari was denied by this Court because the remand made the case, not ripe for review. 389 U.S. at 328. The same considerations apply here.

Without expressing an opinion on the applicability of the Civil Rights of Institutionalized Persons Act, assuming arguendo, this new law provides a remedy, there is no necessity

for this Court to decide the issues presented to it. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955).

B. PRIOR DECISIONS OF THIS COURT HAVE SETTLED THE QUESTIONS PRESENTED BY PETITIONERS

In Hughes v. Rowe, U.S. , 101 S.Ct. 173 (1980) (per curiam), this Court stated, "Segregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions." 101 S.Ct. at 177. In Hughes v. Rowe, the inmate was confined only two days in investigative status prior to his disciplinary hearing and it was found that he stated a claim, not justifying the dismissal of his suit.

While emergency situations may justify segregation prior to a disciplinary hearing[1/], here the situation was much more egregious than in the Hughes v. Rowe case. Any emergency, surrounding the disturbance at Huntingdon and initially justifying segregation without a hearing, ended within a day or two of the incident, but Helms was held in investigative status for 51 days until his disciplinary hearing. Furthermore, unlike the Hughes v. Rowe situation where his claim was found actionable despite his subsequent disciplinary conviction, in this case the Court of Appeals reversed the subsequent disciplinary conviction as unconstitutionally imposed.

The Third Circuit in this action relied, in part, upon Enomoto v. Wright, 434 U.S. 1052 (1978), aff'g, 462 F.Supp. 397 (N.D.Cal. 1976), which fixed conditions for administrative segregation in California prisons and which this Court found created protectable liberty interests that warranted the protections enumerated in Wolff v. McDonnell. However, this

1/ Hughes v. Rowe, 101 S.Ct. at 177.

decision was recognized as not, by itself, the only precedent.[2/] Indeed, the Court of Appeals stated that it was not to read anything more into Enomoto v. Wright than necessary to sustain the judgment of the District Court, citing Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 182-83 (1979). 24a.

In reviewing decisions of this Court concerning State created liberty interests, the Appeals Court noted that Vitek v. Jones, 445 U.S. 480 (1980) cast substantial doubt on any implication from Wright v. Enomoto that prisoners have any interest in avoiding administrative segregation as stemming directly from the United States Constitution. 14a. The Third Circuit rejected any examination of rights of Helms stemming from this source. 7a n.5, 15a. The examination of any State created liberty interests was found to be the source of any rights concerning administrative custody and the decisions of this Court in Wolff v. McDonnell; Meachum v. Fano, 427 U.S. 215 (1976); Baxter v. Palmigiano, 425 U.S. 308 (1976) (considerations pertinent to criminal prosecution irrelevant to prison disciplinary hearings); Vitek v. Jones and many others, were carefully analyzed. 11a-20a.

C. NO CONFLICT EXISTS BETWEEN THE CIRCUITS WITHIN THE MEANING OF RULE 17 OF THIS COURT

Petitioners claim that a conflict among the Circuits has arisen because of this Court's decision in Wright v. Enomoto. First, if the source of any liberty interest is a creation of the State, it stands to reason that some States may provide for guarantees not present in other States. Meachum v. Fano.

2/ Edelman v. Jordan, 415 U.S. 651, 671 (1974) recognized that summary affirmances were obviously of precedential value, but not to the same extent as an opinion of this Court treating the question on the merits.

Second, all of the cases cited by Petitioners as providing some procedural guarantees, performed an analysis similar to the Third Circuit in determining whether legally protected interests arising from State law or regulations were present and recognized Wright as not the sole authority on the analysis to be performed. Accord, Mitchell v. Hicks, 614 F.2d 1016, 1020 (5th Cir. 1980). Indeed, Cummings v. Roberts, 628 F.2d 1065 (8th Cir. 1980); Bono v. Saxbe, 620 F.2d 607 (7th Cir. 1980) and Daigle v. Hall, 564 F.2d 884 (1st Cir. 1977), cited by Petitioners do not even mention the Wright decision in their Opinion.

Petitioners cite Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980) for the proposition that less procedural safeguards were ordered than here, concerning administrative confinement. However, the Bills Court said:

> In a case where the administrative segregation is based on a specific rule infraction, rather than general behavior, its purpose becomes almost identical with that of punitive segregation and there appears to be no reason why the procedural safeguards set forth in Wolff v. McDonnell, . . . should not apply to the specific rule infraction which triggered the decision.

Id. at 1295. Here, Helms received disciplinary charges within 24 hours of his administrative confinement, but waited 50 more days for a hearing. As the Third Circuit ordered the procedural guarantees of Wolff v. McDonnell, there cannot be considered a split between the Third and Sixth Circuits in the context of Helms' confinement for disciplinary, rather than general behavior.

Cummings v. Roberts, 628 F.2d 1065 (8th Cir. 1980) cited by Petitioners, can hardly be considered controlling on the questions presented to this Court. Cummings was a pro se action involving an inmate in the St. Louis City Jail. No mention or analysis of any regulations, directives or State created

liberty interests was performed in reaching a decision. It can only be assumed that none were present and that in conformity with Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981), the opinion realized that no due process guarantees flowed directly from the United States Constitution. Furthermore, Cummings was decided as much upon the Plaintiff inmate's inartfully drawn complaint that contained conclusory allegations of a punitive transfer to segregation, without any supporting facts, than on the basis of no procedural guarantees being present in administrative custody situations. 628 F.2d at 1069.

Finally, Petitioners rely upon Daigle v. Hall as not creating any liberty interests in freedom from administrative segregation and claim that the regulations in that case are analogous to Pennsylvania's.Daigle v.Hall dealt with the same Massachusetts statutes and regulations reviewed by this Court in Meachum v. Fano and which were previously found not to contain any State created liberty interests against prison transfers. 564 F.2d at 885. In contrast to the general regulations in Daigle which did not define specific groups of inmates to be housed in administrative custody[3/], the regulations here limit administrative segregation to particular classes of inmates. 17a.

In addition, Pennsylvania regulations on administrative custody provide, in applicable situations to Helms, that the decision to so confine an inmate "must comply with §95.104(b)(1) [mandating a Wolff type hearing within six days of receiving written notice of disciplinary charges], (3) [mandating release from investigative status in all cases within ten days]" 37 Pa. Code §95.107(a)(1).

Yet the expectations or entitlements in Pennsylvania are

3/ 564 F.2d at 886.

not merely a product of the language of the regulation at issue, but also stem from the source or reason these regulations were promulgated. The preamble to the regulations proclaimed that "The purpose of this order is to bring the Bureau of Correction's above mentioned regulations [concerning disciplinary and restrictive housing] into compliance or into existence in compliance with the Consent Decree as modified by Order of Judge Joseph S. Lord, III, on May 22, 1978 in the case captioned I.C.U. v. Shapp, C. A. 70-3054 (E.D.Pa.)". 8 Pa. B. 2682 (September 12, 1978.)

Thus, the expectations or entitlements involved in administrative segregation for Pennsylvania inmates are not the result of mere hopes or vague or general regulatory language, but the product of a binding Consent Decree the State voluntarily entered.

The cases cited by Petitioners as representing a conflict are either harmonious in reasoning with the case at bar or readily distinguishable on the facts. Furthermore, none have based their decisions on one case or issued orders based on a lack of controlling precedent as Petitioners urge. No reason is present to grant the Writ.

CONCLUSION

WHEREFORE, Respondent prays that for all the reasons aforesaid the Petition for a Writ of Certiorari be denied.

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APPENDIX

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT

Public Law 96-247
96th Congress
An Act

To authorize actions for redress in cases involving deprivation of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.

That this Act may be cited as the "Civil Rights of Institutionalized Persons Act."

SEC 2. Definitions.

As used in this Act -

(1) The term "institution" means any facility or institution -

(A) which is owned, operated,or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is -

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a Jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles -

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any state purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

(2) Privately owned and operated facilities shall not be deemed "institutions" under this Act if -

(A) the licensing of such facility by the State constitutes the sole nexus between such facility and such State;

(B) the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act, constitutes the sole nexus between such facility and such state; or

(C) the licensing of such facility by the State, and the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act, constitutes the sole nexus between such facility and such State;

(3) The term "person" means an individual, a trust or estate, a partnership, an association, or a corporation;

(4) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States;

(5) The term "legislative days" means any calendar day on which either House of Congress is in session.

SEC. 3. INITIATION OF ACTIONS.

(a) Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subje-ting persons residing in or confined to an institution, as defined in section 2, to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available under this Act to persons residing in or confined to an institution as defined in section 2(1)(B)(ii) only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.

(b) In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs.

(c) Any complaint filed by the Attorney General pursuant to this section shall be personally signed by him.

SEC. 4. CERTIFICATION REQUIREMENTS.

(a) At the time of the commencement of an action under section 2 the Attorney General shall certify to the court -

(1) that at least 49 calendar days previously he has notified in writing the Governor or chief executive officer and attorney general or chief

legal officer of the appropriate State or political subdivision and the director of the institution of --

(A) the alleged conditions which deprive rights privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(B) the supporting facts giving rise to the alleged conditions and the alleged pattern or practice, including the dates or time period during which the alleged conditions and pattern or practice of resistance occurred; and when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged conditions and pattern or practice at the time of the certification, and the date on which the alleged conditions and pattern or practice were first brought to the attention of the Attorney General; and

(C) the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistance;

(2) that he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of his intention to commence an investigation of such institution, that such notice was delivered at least seven days prior to the commencement of such investigation and that between the time of such notice and the commencement of an action under section 3 of this Act -

(A) he has made a reasonable good faith effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding financial, technical, or other assistance which may be available from the United States and which he believes may assist in the correction of such conditions and pattern or practice of resistance;

(B) he has encouraged the appropriate officials to correct the alleged conditions and pattern or practice of resistance through informal methods of conference, conciliation and persuasion, including, to the extent feasible, discussion of the possible costs and fiscal impacts of alternative minimum corrective measures, and it is his opinion that reasonable efforts at voluntary correction have not succeeded; and

(C) he is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such conditions and

pattern or practice, taking into consideration the time required to remodel or make necessary changes in physical facilities or relocate residents, reasonable legal or procedural requirements, the urgency of the need to correct such conditions, and other circumstances involved in correcting such conditions; and

(3) that he believes that such an action by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Any certification made by the Attorney General pursuant to this section shall be personally signed by him.

SEC 5. INTERVENTION IN ACTIONS.

(a)(1) Whenever an action has been commenced in any court of the United States seeking relief from egregious or flagrant conditions which deprive persons residing in institutions of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing them to suffer grievous harm and the Attorney General has reasonable cause to believe that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may intervene in such action upon motion by the Attorney General.

(2) The Attorney General shall not file a motion to intervene under paragraph (1) before 90 days after the commencement of the action, except that if the court determines it would be in the interests of justice, the court may shorten or waive the time period.

(b)(1) The Attorney General shall certify to the court in the motion to intervene filed under subsection (a) -

(A) that he has notified in writing, at least fifteen days previously, the Governor or chief executive officer, attorney general or chief legal officer of the appropriate State or political subdivision, and the director of the institution of -

(i) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(ii) the supporting facts giving rise to the alleged conditions, including the dates and time period during which the alleged conditions and pattern or practice of resistance occurred; and

(iii) to the extent feasible and consistent with the interests of other plaintiffs, the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistance; and

(B) that he believes that such intervention by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(2) Any certification made by the Attorney General pursuant to this subsection shall be personally signed by him.

(c) Any motion to intervene made by the Attorney General pursuant to this section shall be personally signed by him.

(d) In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs. Nothing in this subsection precludes the award of attorney's fees available under any other provisions of the United States Code.

SEC. 6. PROHIBITION OF RETALIATION.

No person reporting conditions which may constitute a violation under this Act shall be subjected to retaliation in any manner for so reporting.

SEC. 7. EXHAUSTION OF REMEDIES.

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).

(b)(1) No later than one hundred eight days after the date of enactment of this Act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation

of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resoltuion of disapproval of such standards.

(2) The minimum standards shall provide -

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 3 or 5 of this Act.

SEC. 8. REPORT TO CONGRESS.

The Attorney shall include in his report to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, United States Code -

(1) a statement of the number, variety, and outcome of all actions instituted pursuant to this Act including the history of precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced;

(2) a detailed explanation of the procedures by which the Department has received, reviewed and evaluated petitions or complaints regarding conditions in institutions;

(3) an analysis of the impact of actions instituted pursuant to this Act, including, when feasible, an estimate of the costs incurred by States and other political subdivisions;

(4) a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges or immunities secured or protected by the Constitution or laws of the United States; and

(5) the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.

SEC. 9. PRIORITIES FOR USE OF FUNDS.

(a) It is the intent of Congress that deplorable conditions in institutions covered by this Act amounting to deprivations of rights protected by the Constitution or laws of the United States be corrected, not only by litigation as contemplated in this Act, but also by the voluntary good faith efforts of agencies of Federal, State, and local governments. It is the further intention of Congress that where Federal funds are available for use in improving such institutions, priority should be given to the correction or elimination of such unconstitutional or illegal conditions which may exist. It is not the intent of this provision to require the redirection of funds from one program to another or from one State to another.

SEC. 10. NOTICE TO FEDERAL DEPARTMENTS.

At the time of notification of the commencement of an investigation of an instituion under section 3 or of the notification of an intention to file a motion to intervene under section 5 of this Act, and if the relevant institution receives Federal financial assistance from the Department of Health and Human Services or the Department of Education, the Attorney

General shall notify the appropriate Secretary of his action and the reasons for such action and shall consult with such officials. Following such consultation, the Attorney General may proceed with an action under this Act if he is satisfied that such action is consistent with the policies and goals of the executive branch.

SEC. 11. DISCLAIMER-STANDARDS OF CARE.

Provisions of this Act shall not authorize promulgation of regulations defining standards of care.

SEC. 12. DISCLAIMER-PRIVATE LITIGATION.

The provisions of this Act shall in no way expand or restrict the authority of parties other than the United States to enforce the legal rights which they may have pursuant to existing law with regard to institutionalized persons. In this regard, the fact that the Attorney General may be conducting an investigation or contemplating litigation pursuant to this Act shall not be grounds for delay of or prejudice to any litigation on behalf of parties other than the United States.

Approved May 23, 1980.

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IN THE SUPREME COURT OF THE UNITED STATES

LOWELL D. HEWITT, et al.,	:	October Term, 1981
Petitioners	:	No. 81-638
v.	:	
AARON HELMS,	:	
Respondent	:	

RESPONDENT'S MOTION TO FILE A BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI AND TO PROCEED TO THE TERMINATION OF PROCEEDINGS IN FORMA PAUPERIS

Pursuant to 28 U.S.C. §1915 and Rule 46 of this Court, Respondent by his counsel moves this Court for an Order permitting him to file his Brief in Opposition to Petitioner's Petition for Writ of Certiorari and to proceed to the termination of proceedings in forma pauperis, or without the payment of any fees, costs, or security therefor, because as set forth in this Motion and the attached Affidavit:

1. Respondent is indigent and unable to pay any fees, costs or security to so proceed

2. In forma pauperis status was sought and granted in the United States District Court for the Middle District of Pennsylvania and on appeal in the United States Court of Appeals for the Third Circuit.

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Attorney for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

LOWELL D. HEWITT, Superintendent; B. B. KYLER, C. O. III; R. E. STOTELMYER, Major; B. K. SMITH, Counselor III; K. R. HILEMAN, Farm Manager; D. R. ERHARD, Deputy Superintendent for Treatment; T. W. HENRY, Director of Treatment; W. W. MATEER, C. I. Manager; SCI-HUNTINGDON,	:	October Term, 1981
	:	No. 81-
Petitioners	:	
v.	:	
AARON HELMS,	:	
Respondent	:	

AFFIDAVIT IN SUPPORT OF RESPONDENT'S MOTION TO FILE A BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI AND TO PROCEED TO THE TERMINATION OF PROCEEDINGS IN FORMA PAUPERIS

I, AARON HELMS, being duly sworn, depose and state that I am the Respondent in the above-entitled case; and in support of my Motion to Proceed In Forma Pauperis without being required to pre-pay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress as set forth in my Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

I further swear that the responses I have made to the questions and instructions set forth in Form 4 to the Federal Rules of Appellate Procedure below, relating to my ability to pay the costs of pursuing this matter are true.

1(a). I am not presently employed;

(b). I was last employed in June, 1981 and had a monthly net income of approximately $450.00.

2. In the preceding 12 months the only income I have received has been from the employment set forth above where I worked for three months and Public Assistance, which I am presently receiving, at the rate of $87.00 every two weeks.

3. I do not own any cash or checking or saving accounts.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. I do not have any persons dependent on me for support, except myself.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Aaron Helms
AARON HELMS

Subscribed and Sworn to before me this 13 day of Oct, 1981.

Notary Public
NOTARY PUBLIC

Notary Public, [illegible] Co.
My Commission Expires [illegible] 30, 1982

Amicus Brief for the United States

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No. 81-638

In the Supreme Court of the United States

OCTOBER TERM, 1981

LOWELL D. HEWITT, SUPERINTENDENT, ET AL.,
PETITIONERS

v.

AARON HELMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The petition in this case raises the question of what process is due a Pennsylvania state prisoner in connection with his transfer from the general prison population to administrative detention for nondisciplinary reasons. The court of appeals held that a prisoner subject to such transfer is entitled to a hearing in accordance with the procedural requirements set forth in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and conducted either prior to the transfer or, in exigent circumstances, within a reasonable time thereafter. The court suggested that, in most cases, a "reasonable time" would not exceed 72 hours.

18 U.S.C. 4001(b)(1) vests the "control and management of Federal penal and correctional institutions, except military or naval institutions," in the Attorney General. In turn, the "Bureau of Prisons, under the direction of the Attorney General, [has] charge of the management and regulation of all Federal penal and correctional institutions." 18 U.S.C. 4042(1).

The regulations of the Federal Bureau of Prisons, like Pennsylvania's regulations, provide for the transfer of inmates from the general prison population to administrative detention.[1] Moreover, in the majority of its transfers from general prison populations to administrative detention, the procedures employed by the Bureau of Prisons are substantially similar to those used by the Pennsylvania correctional system, which were held to be violative of due

---

[1]Bureau of Prisons regulations define administrative detention as "the status of confinement of an inmate in a special housing unit in a cell either by himself or with other inmates which serves to remove the inmate from the general population." 28 C.F.R. 541.20. This definition is virtually the same as the definition of disciplinary segregation, which is set forth in 28 C.F.R. 541.19(a). 28 C.F.R. 541.19(a) also provides, however, that "[i]nmates housed in disciplinary segregation have significantly fewer privileges than those housed in administrative detention." More specifically, 28 C.F.R. 541.20(d) provides:

> *Conditions of Administrative Detention.*
> The basic level of conditions as described in § 541.19 for disciplinary segregation also apply to administrative detention. If consistent with available resources and the security needs of the unit, the Warden shall give an inmate housed in administrative detention the same general privileges given to inmates in the general population. Unless there are compelling reasons to the contrary, institutions shall provide commissary privileges and reasonable amounts of personal property. Exercise periods, at a minimum, will meet the level established for disciplinary segregation and will exceed this level where resources are available. The Warden shall give an inmate in administrative detention visiting and correspondence privileges in accordance with Part 540 of this chapter [applicable to inmates in the general prison population].

process by the court below. The United States therefore has a substantial interest in the disposition of the question presented by this case.[2]

STATEMENT

1. On December 3, 1978, a general disturbance occurred at the State Correctional Institution at Huntingdon, Pennsylvania, during which several guards were injured. Respondent was removed from his general population cell at approximately 10:00 p.m. that evening, was interviewed by state police, and was placed in administrative custody. Pet. App. 3a.

The next day, respondent was given a copy of Misconduct Report No. 90908, which charged him with assaulting corrections officers and disrupting normal institutional routine during the previous evening. On December 8, 1978, respondent appeared before an institutional hearing committee, an administrative panel charged with adjudicating charges of misconduct. The report of the hearing committee indicated that no determination of respondent's guilt had been made because of insufficient information, but required respondent's continued detention in administrative custody. Pet. App. 3a-4a.

Eight days after respondent was placed in administrative custody, the Commonwealth of Pennsylvania filed criminal charges against respondent, charging him with assaulting Corrections Officer Rhodes and participating in a riot. On

---

[2]Solely for the purposes of this memorandum, we assume, arguendo, that the Bureau of Prisons' regulations concerning the placement of inmates in administrative detention give rise to a liberty interest in inmates not to be transferred to administrative detention unless the regulatory criteria are satisfied.

January 2, 1979, respondent appeared before an institutional Program Review Committee, which was charged with evaluating the circumstances of inmates in restrictive custody and making recommendations on their future confinement. Such status reviews were to be made at least weekly, with a personal interview of the inmate to be made every 30 days. 37 Pa. Code § 95.103(g). After reviewing respondent's circumstances, the Program Review Committee recommended that he remain in administrative custody. The preliminary hearing on the state criminal charges took place on January 10, 1979. At that time, the criminal proceedings were continued. Pet. App. 5a-6a.

On January 19, 1979, respondent was given a copy of another Misconduct Report, No. 90986, which charged him with striking Corrections Officer Phillips during the December 3, 1978 disturbance. On January 22, 1979, another Hearing Committee was convened on the second misconduct charge. That Hearing Committee found respondent guilty on the second misconduct charge and sentenced him to six months in disciplinary close custody, computed from December 3, 1978. The Hearing Committee's January 22, 1979 report also stated that " '[t]he finding and disposition concludes action on misconduct No. 90908, heard December 8, 1978 without conclusion.' " Pet. App. 6a.

Pennsylvania dismissed the criminal charges against respondent on February 6, 1979. Respondent since has been paroled from the State Correctional Institution at Huntingdon. Pet. App. 6a-7a.

2. Respondent filed this action under 42 U.S.C. 1983 in the United States District Court for the Middle District of Pennsylvania, seeking damages and declaratory and injunctive relief against certain officials of the State Correctional Institution at Huntingdon. The district court granted petitioners' motion for summary judgment, but the Third Circuit reversed. The court of appeals held that Pennsylvania's

prison regulations (37 Pa. Code §§ 95.101-95.108) "establish a liberty interest in all inmates to whom the regulations apply not to be segregated in restrictive custody unless the regulatory criteria are met" (Pet. App. 17a-18a). The court also concluded that the procedure required by the Constitution to effect administrative detention is a hearing conducted according to the procedures set forth in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and held "either before the confinement or, in exigent circumstances, within a reasonable time thereafter" (Pet. App. 26a). The court of appeals indicated (*id.* at 24a-26a) that in most cases a "reasonable time" would not exceed 72 hours.

DISCUSSION

1. The warden of a federal prison facility or an appropriate individual delegated by him may transfer an inmate from the general prison population to administrative detention when the inmate's

> continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate:
>
> (1) [i]s pending a hearing for a violation of institution regulations;
>
> (2) [i]s pending investigation of a violation of institution regulations;
>
> (3) [i]s pending investigation or trial for a criminal act;
>
> (4) [i]s pending transfer; [or]
>
> (5) [r]equests admission to administrative detention for his own protection, or staff determines that admission to or continuation in administrative detention is necessary for the inmate's own protection * * *.

28 C.F.R. 541.20(9)(1)-(5).[3] In such cases, the Bureau of Prisons follows one of two procedural formats.

a. In those cases in which a member of the prison staff "witnesses or has a reasonable belief that a violation of institution rules has been committed" (28 C.F.R. 541.12(a)) by an administratively detained inmate and in which neither an extended institutional investigation nor an outside investigation or trial is required, the inmate is entitled to receive notice of the charges against him in the form of an "incident report" within 24 hours after the prison staff learns of the inmate's involvement in the incident (28 C.F.R. 541.11, 541.12(a), 541.13(a)). In addition, an initial hearing before a unit disciplinary committee (UDC) must be held within 48 hours after the staff learns of such an incident. The hearing before the UDC is not a *Wolff*-type hearing.[4] However, the inmate is entitled to be present at the hearing, to make a statement and to present documentary evidence in his own behalf, and to receive a written copy of the decision and the disposition of the charges against him. 28 C.F.R. 541.13(c)-(f).

---

[3]Because the decision below involved a transfer from the general population to administrative detention, it has no effect upon a corrections system's ability to place in administrative detention an inmate who is in the institution only while en route to another institution, a new commitment who has not yet been classified, or an inmate who is being transferred out of disciplinary segregation. See 28 C.F.R. 541.20(a)(6).

[4]*Wolff* v. *McDonnell*, 418 U.S. 539 (1974), required that before an inmate may be deprived of good time credits for disciplinary reasons he must be afforded 1) at least 24 hours advance written notice of the violation he is alleged to have committed, 2) an opportunity to call witnesses and present documentary evidence in his defense "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals" (*id.* at 566), and 3) a written statement by the factfinders of the evidence relied upon and the reason for the disciplinary action taken. Rights of confrontation, cross-examination and counsel were not required (*id.* at 567-570).

The UDC may impose minor sanctions for the charged offense or drop the charges against the inmate completely. When major sanctions, including the continuation of administrative detention, are thought to be required, the UDC refers the inmate for a hearing by the institutional disciplinary committee (IDC). In full accordance with the dictates of *Wolff* v. *McDonnell, supra,* an inmate who appears before an IDC is entitled to receive at least 24 hours advance notice of the hearing, to be present during the hearing, to be afforded representation by a full time staff member of the institution, to make a statement and to present documentary evidence in his own behalf, to call witnesses to testify and to present documentary evidence in his behalf "provided the calling of witnesses or the disclosure of documentary evidence does not jeopardize or threaten institutional or an individual's security," and to receive a copy of the IDC's decision and disposition of the charges against him. 28 C.F.R. 541.15(a)-(g). The inmate also is entitled to an administrative appeal from the decision of the IDC. 28 C.F.R. 541.17.

While the Bureau's regulations make clear that an IDC hearing may not be held within 24 hours of the inmate's receiving notice of the hearing (absent a waiver by the inmate), they establish no outside limit on the time within which an IDC hearing must be held. We are advised by Bureau officials, however, that IDC hearings usually take place between five and seven days after the inmate has received a copy of the incident report, that is, between six and eight days after the prison staff's awareness of the inmate's involvement in the incident. In our view, these procedures are not necessarily called into question by the decision below.[5]

---

[5]The court of appeals' opinion simply strikes down the procedures employed by Pennsylvania; it does not purport to pass on the validity of the federal procedural scheme described in the text above. Indeed, the

b. However, in a substantial number of cases, a second procedural format is employed. In those cases, in which the pendency of either an extended institutional investigation, outside investigation or trial requires delay, a copy of an incident report ordinarily is furnished to the inmate, but the UDC and the IDC hearings may be substantially postponed. In such a case, within seven days of an inmate's initial detention he is afforded an in person (but non-*Wolff*-type) review to determine whether he should remain in administrative detention. After the first in person review, the inmate will be afforded a record review every seven days and an in person review at least every 30 days. 28 C.F.R. 541.20(c).[6]

There also are cases of administrative detention in which no incident report can promptly be prepared because there is insufficient information on which to base a charge. Nonetheless it may be deemed necessary to place an inmate in administrative detention following the occurrence of an incident for, *e.g.*, the protection of the inmate himself, other inmates, the prison staff or the security and order of the institution. See 28 C.F.R. 541.20(a). In these cases an inmate is entitled to receive a copy of a memorandum detailing the reasons for his placement in administrative detention within 24 hours of such confinement. 28 C.F.R. 541.20(b). Here too, the inmate is entitled to receive the seven-day record reviews and the 30-day in person hearings described above.

---

opinion contains several indications that, had the above-described federal procedure been before the Third Circuit, it would have been upheld (see, *e.g.*, Pet. App. 26a n.11, 27a).

[6]Special procedures, including a *Wolff*-type hearing within seven days of confinement, have been established for inmates who are placed in administrative detention for protection, but not at their own request or beyond the time when they feel they need to be detained for their own protection. See 28 C.F.R. 541.21(b).

2. In both situations described in part I.b above, the procedures afforded inmates by the Bureau of Prisons are substantially similar to those that Pennsylvania afforded respondent, which the court of appeals found to be constitutionally deficient. Accordingly, the Bureau of Prisons may be required, at least within the Third Circuit, to implement the type of procedures required by the decision below in the majority of its administrative detention cases.[7] Beyond this, the Bureau of Prisons operates a national prison system, which contemplates the application of uniform procedures nationwide. Thus, the decision of the court of appeals could result in a revision of prison procedures on a national scale. In these circumstances, and in view of the broad extension of due process principles approved by the court below, we believe that review by this court is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1981

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[7]We are advised by the Bureau of Prisons that implementation of the procedures called for by the decision below would require the holding of approximately 100 additional hearings per month at the United States Penitentiary at Lewisburg, Pennsylvania, and the Federal Prison Camp at Allenwood, Pennsylvania.

Petitioner's Brief

Supreme Court, U.S.
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No. 81-638

In the Supreme Court of the United States

October Term, 1981

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Petitioners

v.

AARON HELMS,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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Petition filed September 24, 1981
Certiorari granted March 8, 1981

QUESTIONS PRESENTED

1. Does the transfer of a prisoner from the general prison population to administrative segregation for non-disciplinary reasons pending completion of an investigation into his involvement in a prison riot implicate a protectible liberty interest which may not be infringed absent some process within the meaning of the due process clause?

2. Assuming that Respondent's transfer from the general prison population to administrative segregation does implicate a protectible liberty interest, what process is due?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit of June 30, 1981 has been published *sub nom. Helms v. Hewitt*, 655 F.2d 487 (3d Cir. 1981). A copy may be found in the Appendix to the Petition for Writ of Certiorari, pp. 1a-34a. The opinion of the United States District Court for the Middle District of Pennsylvania is not reported and may be found in the Appendix to the Petition for Writ of Certiorari, pp. 35a-45a.

JURISDICTION

The opinion of the Court of Appeals for the Third Circuit was issued on June 30, 1981. The petition for a writ of certiorari was filed within ninety days of that date on September 24, 1981. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section one of the fourteenth amendment to the United States Constitution provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

STATUTE INVOLVED

The Civil Rights Act of 1871, c. 22, §1 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983.

STATEMENT OF THE CASE

On December 3, 1978, a riot occurred at the State Correctional Institution at Huntingdon, Pennsylvania, during which a group of prisoners attempted to take over the central control area of the institution. During that riot, several guards were injured,[1] but with the help of local and state police as well as off-duty correctional officers the prison officials quelled the disturbance that same day (51a)[2].

Respondent was removed from his general population cell at approximately 10:00 p.m. that evening, was interviewed by the Pennsylvania State Police, and was transferred to administrative custody status in the prison (Pet. App. 3a)[3]. The next day, respondent Helms was given a copy of institutional Misconduct Report No. 90908, which charged him with assaulting a corrections officer and disrupting normal institutional routine during the previous evening (33a).

On December 8, 1978, respondent appeared before an institutional hearing committee which is an administrative panel charged with adjudicating charges of misconduct within the state correctional institution (60a). The Hearing Committee stated in its

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[1] The extent of the incident is stated in some detail at 48a-53a.

[2] This designation is employed in making reference to the Joint Appendix.

[3] This designation is employed in making reference to the appendix attached to the Petition for Writ of Certiorari.

report of the hearing that no determination of Helms' guilt had been made because of insufficient information, but it required his continued detention in segregation (40a). Eight days after respondent was placed in administrative segregation, the State Police filed criminal charges against him, charging him with assaulting a corrections officer and participating in a riot (14a, 33a, 53a, 80a).

Regulations of the Pennsylvania Bureau of Correction require that status reviews of prisoners housed in administrative segregation be made at least weekly without the prisoner present and that an in-person status review session take place at least every thirty days. 37 Pa. Code §95.103(g). Those reviews are conducted by an institutional Program Review Committee, an administrative body charged with evaluating the circumstances of prisoners in restrictive custody status and making recommendations on their future confinement (11a).

Pursuant to those regulations, respondent's status was reviewed on a weekly basis, based on his records and staff reports relating to his behavior while in administrative segregation. In addition, Helms appeared before the Committee in person on January 2, 1979. On that date, after reviewing respondent's circumstances, the Program Review Committee recommended that he remain in administrative segregation (11a). The preliminary hearing on the state criminal charges took place on January 10, 1979. At that time, however, the criminal proceedings were continued (82a).

On January 19, 1979, respondent was given a copy of institutional Misconduct Report No. 90986,

which charged him with striking a different corrections officer during the December 3, 1978 riot (33a). On January 22, 1979, another Hearing Committee was convened on the second misconduct charge (26a). That Hearing Committee found respondent guilty of the second misconduct charge and sentenced him to six months in disciplinary close custody, computed from December 3, 1978 (31a).[4] The Hearing Committee's January 22, 1979 report also stated that " '[t]he finding and disposition concludes action on Misconduct No. 90908, heard December 8, 1978 without conclusion.' "(31a).

When the preliminary hearing on the criminal charges was reconvened on February 6, 1979, the criminal charges against respondent were withdrawn. Helms was paroled from the custody of the Pennsylvania Bureau of Correction on February 20, 1980 (81a).

This suit was instituted on July 26, 1979, alleging a violation of respondent's fourteenth amendment right to due process of law (58a). Defendants, petitioners herein, include the Superintendent of Huntingdon and the members of the Program Review Committee. The relief sought included a declaratory judgment, an injunction against continuing respondent in segregated

---

[4] The hearing held January 22, 1979 was a *Wolff* type hearing held in accordance with the applicable state regulations. 37 Pa. Code §95.103. No challenge was made by respondent to the procedure employed at that hearing, only to the quality of the testimony. Upon the Hearing Committee's determination that respondent was guilty, respondent was placed into disciplinary custody with credit for all time spent in administrative custody (44a).

housing, a reversal and expungement of his institutional misconduct and damages (63a, 64a).

By order dated August 15, 1980, the District Court denied respondent's motion for summary judgment, granted petitioners' cross-motion for summary judgment, and entered judgment in favor of the petitioners (Pet. App. 37a-46a). The Court held that no interest protected by the fourteenth amendment was implicated by respondent's confinement in administrative segregation, that the petitioners had complied with state regulations in dealing with respondent's confinement and that the institutional hearing committee's reliance upon information obtained from a confidential informant was not improper (Pet. App. 37a-45a).

On June 30, 1981, the Court of Appeals for the Third Circuit reversed the judgment of the District Court and remanded the cause for further proceedings (Pet. App. 35a, 36a). The Court of Appeals held that the regulations of the Pennsylvania Bureau of Correction conferred to a prisoner a liberty interest in freedom from transfer to administrative segregation and that upon such transfer due process protections must be afforded. *Helms v. Hewitt*, 655 F.2d 487 (1981) (Pet. App. 1a-34a).

Relying in large part upon this Court's summary affirmance in *Enomoto v. Wright*, 434 U.S. 1052 (1978), the Court of Appeals found that that affirmance established a rule that any written guidelines for state action affecting prisoners creates an expectation that those guidelines will be followed and that that expectation automatically creates an entitlement and a liberty interest for purposes of due process. The court

further held that the procedures to be employed when a prisoner is transferred for non-disciplinary reasons are the same procedures prescribed by this Court for deprivations of statutory "good time" credits in *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Helms*, 655 F.2d at 500 (Pet. App. 25a). The Court of Appeals noted that the effect of its holding is to declare that respondent was denied due process of law unless he was afforded pre-transfer a *Wolff* type[5] hearing, or a *Wolff* type hearing within a reasonable time after transfer, which was to determine whether he represented the type of risk which warranted administrative segregation. *Helms*, 655 F.2d at 500 (Pet. App. 25a-28a).[6]

Petitioners sought a writ of certiorari for this Court to review the opinion of the Third Circuit Court of Appeals holding that respondent was denied due process by placing him in administrative segregation unless he was afforded the procedural protections of *Wolff*.

The Court granted the Writ of Certiorari on March 8, 1982.

---

[5] The Court of Appeals did not set out all of the procedures to be accorded instead characterizing it as "a hearing as described in Wright and Wolff" (*Id.* at 500). *Wolff* requires: (1) advance written notice of violation at least 24 hours before hearing; (2) an opportunity to call witnesses and present documentary evidence in the prisoner's defense provided "permitting him to do so will not be unduly hazardous to institutional safety or correctional goals" (*Wolff*, 418 U.S. at 566); (3) written statements of evidence relied upon and reasons for action; and (4) assistance from a prisoner or some other source is illiterate or the issue is complex. *Wolff*, 418 U.S. at 563-570.

[6] The Court also held that respondent was denied due process by the petitioners' reliance upon the account of the confidential informant at the January 22, 1979 misconduct hearing. *Helms*, 655 F.2d at 501-503 (Pet. App. 28a-33a). That issue was not, however, presented to this Court for review.

SUMMARY OF ARGUMENT

I. In this case, the Court of Appeals held that any written guidelines for state action affecting prisoners creates an expectation that these guidelines will be followed and that that expectation automatically creates an entitlement and a liberty interest for purposes of due process analysis. That analysis is, of course, simplistic and ignores the more complex considerations this Court has prescribed for determining the existence of liberty interest. It also ignores this Court's long-time recognition that prison officials be given considerable deference to operate their institutions in a safe and efficient manner. *Bell v. Wolfish*, 441 U.S. 520 (1979); *Meachum v. Fano*, 427 U.S. 215 (1976).

II. The transfer to administrative custody at issue in this case was not "qualitatively different from the punishment characteristically suffered by a person convicted of a crime." *Vitek v. Jones*, 445 U.S. 480, 493 (1980); the guidelines involved here do not speak in mandatory terms, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979); the decision to segregate is subjective and predictive, not subject to retrospective and objective fact-finding, see *Greenholtz*, 442 U.S. at 8. The transfer was non-punitive in purpose, serving a legitimate governmental interest. *Bell v. Wolfish*, 441 U.S. 520 (1979). When proper weight is given to these considerations, it becomes clear that a prisoner, such as respondent, has no liberty interest in remaining in the general prison population.

III. Assuming that respondent had a protectible liberty interest in not being transferred to administrative custody the process accorded him was all he was due. The nature of due process requires flexibility. *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). The judicial model of an evidentiary hearing is not universally mandated. *Matthews v. Eldridge*, 424 U.S. 319 (1976). Three distinct factors must be considered: the private interest affected; the risk of erroneous deprivation of that interest and the probable value, if any, of additional or substitute procedural safeguards; and the governmental interest including the administrative and fiscal burden additional procedural requirements would entail. *Id.* at 335.

The private interest in not being transferred to administrative segregation is not comparable to the nature of those interests found by this Court to mandate extensive process. Such transfer does not threaten to violate any important substantive right nor causes the prisoner "to suffer grievous loss of any kind." *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Rather, it is not "qualitatively different from the punishment characteristically suffered by a person convicted of a crime." *Vitek v. Jones*, 445 U.S. 480, 493 (1980).

The risk of erroneous deprivation is diminished by the recurring evaluation process employed by Pennsylvania. Further, the determination to segregate "based on the situation and the need for control", 37 Pa. Code §95.104(b)(1), is necessarily predictive and the procedures required by the Court below "would be unlikely to have significant value in reducing the number of erroneous deprivations." *Dixon v. Love*, 431 U.S. 105, 114 (1977).

The responsibility of the prison administrators to maintain security and preserve order in correctional institutions "are essential goals" which are properly served by the procedures in this case. *Bell v. Wolfish*, 441 U.S. 520, 546 (1979). Additional procedures would be redundant and cause unreasonable burdens on the exercise of discretion necessarily left to those officials charged with the safe and efficient operation of the prisons.

ARGUMENT

I. The Transfer of a Prisoner From the General Prison Population to Administrative Segregation Pending Completion of an Investigation Into His Involvement in a Prison Riot Does Not Implicate Any Liberty Interest for Purposes of the Due Process Clause

It is now axiomatic that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal sustem." *Price v. Johnston*, 334 U.S. 266, 285 (1948). A prisoner's "liberty" interest is similarly limited as his "... conviction and sentence sufficiently extinguish ... [his] liberty 'to empower the State to confine him in any of its prisons.' " *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979), quoting from *Meachum v. Fano*, 427 U.S. 215, 224 (1976). Because of the process provided a prisoner in the course of the criminal conviction and

sentencing proceeding, the liberty interests otherwise enjoyed by citizens, as free citizens, have been constitutionally reduced for the prisoner to a residuum.

This Court has also held that:

> ... changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him." Montanye v. Haymes, 427 U.S. at 242.

Greenholtz, 442 U.S. at 7. Thus, the conditions and degree of confinement which flow from conviction and sentencing will vary according to a variety of factors, including an assessment of each individual's dangerousness.

Moreover, each individual, from receipt in a penal facility until his release, is the subject of many administrative reviews. These reviews are conducted with varying degrees of knowledge and participation by the prisoner, from effectively no knowledge on the part of the prisoner to active participation in the decision making process. The range of decisions include: place of confinement, both as to which facility is appropriate and within the appropriate facility which cell block or housing unit is appropriate; his job assignment; the potential for freedom of movement; and the possibility and variety of educational and vocational opportunities available to him. Clearly, each of these decisions has a substantial impact on the prisoner. Yet, this Court has never held that such day-

to-day operational decisions implicate liberty interests requiring due process.

Of course, quite apart from those liberty interests specifically guaranteed by the Constitution, the state may create a liberty interest through its regulations and statutes which it was not required to adopt. Examples of state created liberty interests are: good time credits which could be reduced only upon a finding of serious misconduct, *Wolff v. McDonnell*, 418 U.S. 539 (1974); favorable parole consideration unless one of a list of findings is made, *Greenholtz*; and transfer from a penal facility to a mental health facility, *Vitek v. Jones*, 445 U.S. 480 (1980). However, the myriad of decision-making guidelines which are used by prison administrators in the day-to-day operation of penal facilities militate against guidelines alone forming a protectible liberty interest.

In this regard, the language in *Vitek* is illuminating. In *Vitek*, the transfer of a prisoner to a mental facility to undergo mandatory behavior modification treatment constituted a major change in conditions of confinement. *Id.*, at 494. The classification as mentally ill, with its stigmatizing consequences, was found to be outside of the contemplation of the original sentence and as such to be "qualitatively different from the punishment characteristically suffered by a person convicted of a crime."[7] *Id.* at 493. Likewise, each of the other state-created liberty interests recognized by this Court has involved substantial

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[7] The transfer subjected the prisoner to compelled treatment in the form of mandatory behavior modification programs. *Id.* at 492.

changes in the conditions of confinement, not minor changes necessary to the efficient and safe operation of the institution.[8]

In this case the regulation at issue provides:

> The inmates therein shall have all the rights and privileges accorded to the general population except for freedom to move about the institution, freedom to engage in programs with the general population, the use of civilian clothing, the use of items specifically found by the Program Review Committee to be a security hazard ...

37 Pa. Code §95.107(a)(2). In short, the prisoner confined to administrative custody retains most of the rights accorded to the general population, except for certain privileges inherently inconsistent with restrictive custody. Thus, unlike the plaintiff in *Vitek*, respondent's temporary administrative separation from general population, until the investigation of the December 3 riot could be completed, cannot be characterized as qualitatively different or beyond the degree of confinement contemplated by the original sentence.

Nor do the regulations at issue in this case[9] speak in the type of mandatory terms which were found to

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[8] In *Wolff*, the forfeiture of already earned good time credits where such forfeiture was conditioned on finding "flagrant or serious misconducts", 418 U.S. at 546, was found to create a liberty interest. Likewise, in *Greenholtz*, language mandating release to parole unless specific findings were made created a mutual expectation conferring a liberty interest in that release. Thus, both cases involved release from incarceration, obviously a substantial change in the conditions of confinement.

[9] A complete copy of the regulations, 37 Pa. Code §§95.101-95.108, is appended to this brief.

create a liberty interest in *Greenholtz*, 442 U.S. at 11-12. Indeed, nothing about the Pennsylvania regulations is mandatory; if the ranking officer believes it is justified, segregation is permitted, not required.

As importantly, the guidelines established by those regulations require highly subjective and predictive judgments not susceptible to retrospective and objective fact-finding. For example, when a prisoner is charged with a major misconduct the ranking officer on duty may place a prisoner in segregation "based upon his assessment of the situation and the need for control" pending a disciplinary hearing. 37 Pa. Code §95.104(b)(1). When the prisoner is not specifically charged, but rather confined in an investigative status, the guideline given is whether "there is a threat of a serious disturbance, or a serious threat to the individual or others." 37 Pa. Code §95.104(b)(3).

Respondent was confined because he was charged with a major misconduct and the ranking officer, aware of the extent of the incident, assessed the situation and determined that it required respondent's temporary segregation because of the need for control. There is, thus, "no prescribed or defined combination of facts" which, if shown, would have required or barred respondent's segregation. *See Greenholtz*, 442 U.S. at 8. Rather, the responsible prison official was required to balance a number of factors not subject to objective evaluation. This situation is in stark contrast to the purely objective factual determinations relevant to the revocation of parole, *Morrissey v. Brewer*, 408 U.S. 471 (1972), the revocation of probation, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and the revocation of good time credits, *Wolff*.

Finally, respondent's confinement had no punitive purpose. To the contrary, the obvious penological purposes served by the transfer in this case are to facilitate the investigation, including interviewing potential prisoner informants; to assess the overall tenor of the institution for the potential of further incidents; to relieve the tension of the institution by removing from the general population those who were believed to have precipitated the incident of December 3, 1978; and to allow time to determine if respondent was a danger to staff and prisoners.[10] Because the confinement served legitimate governmental interests unrelated to punishment, and concomitant to the duty imposed upon the prison administrators to keep all prisoners remanded to their care and custody safe and secure, the temporary administrative segregation was within the contemplation of the original sentence and, therefore, implicated no liberty interest. *See Vitek v. Jones*, 445 U.S. 480 (1980).

In ignoring these factors and finding a liberty interest to arise automatically from written guidelines, the Third Circuit misinterpreted the significance of this Court's affirmance of *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976), *aff'd mem.*, 434 U.S. 1052 (1978), and, more importantly, created a simplistic rule which will substantially impair the ability of prison officials to operate their institutions.

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[10] Each of these purposes of confinement is not conditioned on only what has occurred but rather substantially and most importantly on what may occur. To a great extent it is a "purely subjective evaluation and [an attempt to produce] ... future behavior...." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981).

In *Wright*, this Court summarily affirmed a ruling by a three-judge district court that California regulations concerning administrative segregation conferred a liberty interest upon prisoners not to be so confined without a hearing. This Court's summary affirmance means only that the lower court's judgment was affirmed, not that its reasoning was endorsed. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176-77 (1977).[11]

Nonetheless, the Third Circuit declared unequivocally: "It is clear, then, that the Supreme Court affirmed Wright on the ground that California prisoners possessed a state-created liberty interest protectible under the Due Process Clause." Pet. App. 17a. An equally reasonable reading of *Wright* is that this Court was concerned about the widespread abuses demonstrated in that case and found the district court's procedural due process remedy a reasonable solution to that problem.

In any case, if *Wright* was intended to prevent prison officials from acting arbitrarily,[12] the pro-

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[11] Nor is such an affirmance binding on this Court. *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

[12] The facts of *Wright* support that view. California prison officials were found to have confined prisoners to maximum security segregation for extended periods (in some cases, even years) for irrational reasons which, in any case, had no factual basis. In addition the district court found that the practices challenged in *Wright* effectively precluded the affected prisoners from being considered for parole, a much more substantial impact than those demonstrated in this case. *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

cedural due process rule articulated by the Court of Appeals goes too far. In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court established that arbitrary action by prison officials is violative of substantive due process and, therefore, subject to full judicial review. Such a remedy is fully adequate to protect prisoners from the danger that prison officials will abuse their discretion.

The Court of Appeals' ruling that the promulgation of written guidelines by prison officials automatically creates a constitutionally protected entitlement in prisoners to have those guidelines followed has the obvious result of discouraging the development and publication of such guidelines. This result is both ironic and undesirable. The guidelines at issue in this case, and many others, are intended to promote some uniformity in a multi-institution system. They are also intended to assure that individual wardens are accountable to their supervisors for their actions. If, however, the cost of such uniformity and accountability includes the time-consuming, expensive and inefficient procedures required by the Court of Appeals, it is reasonable to assume prison officials will forego establishing or even repeal such guidelines. Such a result serves no desirable purpose and yet necessarily follows from the holding that the promulgation of guidelines creates the type of liberty interest found by the lower court in this case.

II. Assuming That Respondent's Transfer From General Prison Population to Administrative Segregation Does Implicate a Protectible Liberty Interest the Process Accorded Him Affords the Process Due

The fourteenth amendment protects only against deprivations of life, liberty or property without due process of law. *Parratt v. Taylor*, 451 U.S. 527 (1981). Thus, even if it is determined that a protectible interest is implicated by the particular state action at issue, "the question remains what process is due" the citizen when the interest is infringed by the government. *Goss v. Lopez*, 419 U.S. 565, 577 (1975); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). In this case, there can be no dispute that respondent received process. Thus, even if this Court determines that respondent had a protectible liberty interest, the question remains whether the process he received was process that was due.

In this regard, this Court repeatedly has recognized that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Goss*, 419 U.S. at 577. In a recent decision the Court noted that,

> [D]ue process is not a technical conception with a fixed content unrelated to time, place and circumstances. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty.

Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 24 (1981). Thus, rather than mandating a universal "judicial model of an evidentiary hearing" to satisfy the dictates of due process, the Court has required the case-by-case consideration of three distinct factors in determining what process is due. *Matthews v. Eldridge*, 424 U.S. 319 (1976).

In *Eldridge*, the Court held that consideration must be given to first, the private interest that will be affected, second, the risk of an erroneous deprivation of such interest and the probable value, if any, of additional or substitute procedural safeguards, and third, the governmental interest including the function involved and the administrative and fiscal burden that the additional or substitute procedural requirements would entail. *Id.* at 335. *Accord Ingraham v. Wright*, 430 U.S. 651, 675 (1977). Application of these standards in this case requires the conclusion that respondent received whatever process he was due under the fourteenth amendment.

The private interest that is affected by a decision to transfer a prisoner from general population to administrative segregation is a freedom from further restriction of the limited right of movement retained inside a prison and the curtailment of certain limited privileges which prisoners in general population status enjoy. 37 Pa. Code §95.107(a)(2). Although the Court of Appeals implicitly characterized the prisoner's interest as a "severe impairment of the residuum of liberty which he retains as a prisoner," 655 F.2d 487, 494-5, quoting *Wright v. Enomoto*, 462 F. Supp. 397, 402 (N.D. Cal. 1976), *aff'd mem.*, 434 U.S. 1052 (1978), the pertinent regulation of the Pennsylvania

Bureau of Correction provides that a prisoner confined to administrative segregation "shall have all the rights and privileges accorded to the general population, except for [the] freedom to move about the institution, [the] freedom to engage in programs with the general population, the use of civilian clothing and the use of items specifically found by the Program Review Committee to be a security hazard." 37 Pa. Code §95.107(a)(2).

As this Court has recognized:

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights.

Bell v. Wolfish, 441 U.S. 520, 546 (1979) (citations omitted). Thus, this is not a case where the arguable private interest that is affected involves, for example, the fundamental right to raise one's children which is an "essential", "basic civil right of man," *Stanley v. Illinois*, 405 U.S. 645, 650 (1972) (termination of parental rights of unwed father). Nor is this a case where the private interest is "perhaps the most important function of state and local governments," namely, education. *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (expulsion from school). Likewise, this is not a case where the infringement of the private interest may deprive one "of the very means by which to live while he waits" the outcome of the determination. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (termination of welfare benefits).

The private interest in this case simply does not compare with the nature of those interests affected in the above-cited cases. A transfer from the general prison population to administrative segregation, while not insignificant to the particular prisoner involved, neither threatens to violate any important substantive right nor condemns the prisoner "to suffer grievous loss of any kind." *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

To the contrary, as is noted above, administrative segregation involves consequences which are not so "qualitatively different from the punishment characteristically suffered by a person convicted of crime." See *Vitek v. Jones*, 445 U.S. 480, 493 (1980). "[A]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed," changes in his conditions of confinement, even if they operate to cause "a substantial adverse impact" on him, do not invoke the protections of due process. *Vitek*, 445 U.S. at 493; *Montanye v. Haymes*, 427 U.S. 236, 242 (1976). It follows that in this case where the liberty interest, if any, is at best marginal, only minimal process is required to protect that interest.

The second factor to be considered under the *Eldridge* analysis is the risk of erroneous deprivation and probable value, if any, of substitute safeguards. *Eldridge*, 424 U.S. at 335. The procedural framework established by the Pennsylvania regulations provides the prisoner with significant recurring opportunities to demonstrate that his administrative segregation is not warranted. The procedure provides necessary protections for such decisions and the substitute procedures

required by the Court below "would be unlikely to have significant value in reducing the number of erroneous deprivations." *Dixon v. Love*, 431 U.S. 105, 114 (1977).

In this regard, it should be noted at the outset that the regulations of the Pennsylvania Bureau of Correction, which were utilized to transfer the respondent in this case, do not allow administrative transfers without any process whatsoever. 37 Pa. Code §95.103 *et seq.* Indeed, as the Court below acknowledged, 665 F.2d at 490-91 (Pet. App. 5a), the regulations provide for two-tier periodic status reviews of those prisoners assigned to segregation for non-disciplinary reasons.

The status reviews are conducted by the Program Review Committee of the correctional institution in which the prisoner is incarcerated. The Committee, which is composed of the Deputy Superintendent for Operation, the Deputy Superintendent for Treatment and the Classification and Treatment Supervisor, bases its weekly decisions whether to continue a prisoner in administrative segregation upon the prisoner's counselor's notes and recommendations and upon entries in the prisoner's record from staff regarding the prisoner's attitude and actions in segregated housing. 37 Pa. Code §95.103(g)(1). In the case of the thirty-day, in-person reviews, the Program Review Committee bases its decisions upon the counselor's notes and recommendations, upon available psychological and psychiatric reports, upon staff recommendations and observations regarding the prisoner's attitude and actions, and upon the prisoner's attitude and actions during the personal interview. 37 Pa. Code §95.103(g)(4).

The difference between the decision to segregate a prisoner for disciplinary reasons and to segregate him for non-disciplinary reasons is fundamental to the operation of "a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." *Wolff v. McDonnell*, 418 U.S. 539, 561 (1974). Decisions to transfer prisoners for disciplinary reasons are conditioned upon the occurrence of a specified event; they are made only in the face of specific evidence that violations of particular behavior regulations have occurred. 37 Pa. Code §95.103. On the other hand, decisions to transfer prisoners for non-disciplinary reasons, like parole determinations, may be made "for a variety of reasons and often involve no more than informed predictions as to what would best serve (correctional purposes) or the safety and welfare of the inmate." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 10 (1979); *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

It is true that before a person finally is deprived of a protected interest he must be afforded opportunity for some kind of a hearing, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing. *Smith v. Organization of Foster Families*, 431 U.S. 816, 848 (1977). The Court has also recognized, however, that the "judicial model of an evidentiary hearing is neither a required, nor the most effective method of decision-making in all circumstances." *Eldridge*, 424 U.S. at 348. The "hearing required [by due process] is only one appropriate to the nature of the case." *Organization of Foster Families, supra*, 431 U.S. at 848. In ad-

dition, "[t]he establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication." *Stanley v. Illinois*, 405 U.S. 656 (1972).

Petitioners recognize that the weekly and monthly status reviews by the Program Review Committees of the various institutions within the Pennsylvania Bureau of Correction do not guarantee that the procedures will be free from error. The "possibility of administrative error inheres in any regulatory program ...," *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 302 (1981); however, just as the Court has acknowledged that the "[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action," *Id.* at 300, the benefit to the individual inmate of a *Wolff*-type hearing is outweighed by the need of corrections administrators to take more summary administrative action in the interest of the safety of the entire prison society. *See Eldridge*, 424 U.S. at 348.

While the Court has not addressed squarely the issue of what process is due a prisoner who is transferred from general population status to administrative segregation, *cf. Enomoto v. Wright*, 434 U.S. 1052 (1978), the Court has adverted to the petitioners' position in *Greenholtz v. Inmates of Nebraska*, 442 U.S. 1 (1979). In *Greenholtz* the Court stated that "procedures designed to elicit specific facts, such as those required in Morrissey, Gagnon, and Wolff are not necessarily appropriate to a ... parole determination." *Id.* at 14. The Court found that since the Nebraska Board of Parole's decision at its review hearing was

one that must be made largely on the basis of the prisoner's files, the procedure adequately safeguarded against serious risks of error, and therefore, satisfied due process. *Id.*, at 15. The Court noted that the parole-release decision is "subtle" and depends upon

> an amalgam of elements, some of which are factual but any of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release.
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> * * *
>
> The decision turns on a discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done.

Id. at 10. Decisions to transfer a prisoner to segregation for safety and security reasons, like decisions to parole a prisoner and like decisions to dismiss a student for academic cause, involve a "judgment [that] is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision." *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 90 (1978).

The third factor to be considered under the *Eldridge* test is the governmental function involved and the burden that additional procedures would entail. *Eldridge*, 424 U.S. at 335. The importance of the particular government interest at issue in this case cannot be exaggerated. This Court has stated that maintaining the security and preserving the order of correctional institutions "are essential goals." *Bell v. Wolfish*, 441 U.S. 520, 546 (1979). In addition, substantial

weight is to be given to the judgment of the prison administrators, as the officials charged with the responsibility of operating the nation's prisons safely and efficiently. *Id.* As this Court has recognized, these officials are entitled to "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security" for the often-stated reason that "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Id.* at 546-7; *Pell v. Procunier*, 417 U.S. 817, 823 (1974).

The central consideration of internal security clearly was at work in the instant case. A prison riot had occurred in which several guards were injured. *Helms*, 655 F.2d at 489 (Pet. App. 3a). It was imperative, therefore, to segregate the prisoners suspected of involvement in the disturbance. When the State Police initiated a criminal prosecution of the respondent, it was clear that his alleged involvement amounted to more than a mere suspicion. "[I]n the absence of substantial evidence in the record to indicate that the officials have exaggerated their response" to considerations of internal security, "courts should ordinarily defer to their expert judgment in such matters." *Wolfish*, 441 U.S. at 548; *Pell*, 417 U.S. at 827. Accordingly, the decision not to "return a suspected perpetrator of prison violence to the general prison population ... because his [disciplinary] hearing must be delayed," *Helms*, 655 F.2d at 500 (Pet. App. 27a), in anticipation of what a criminal investigation may reveal, cannot be considered an "exaggerated

response" to considerations of internal order and security.

Just as in *Morrissey v. Brewer*, 408 U.S. 471 (1972), where the state had "an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial ...," *Id.* at 483, the petitioners in this case had a paramount interest in protecting the prison society by removing the respondent from the general prison population and keeping him segregated until it was safe to return him to the regular prison society. The prison officials did not have the option of sending home everyone who was suspected of involvement in the disturbance as has been suggested in the context of school disruptions. *Cf. Goss v. Lopez*, 419 U.S. 565, 592, n. 9 (1975). Summary administrative action was justified in this emergency situation where the safety of the particular society was involved. *Hodel*, 452 U.S. at 298-303.

Full-blown hearings, as required by the Court of Appeals, require time, personnel and a diversion of attention from normal prison activities. *Ingraham v. Wright*, 430 U.S. 651, 681 (1977). In addition, to require the procedural mechanisms of *Wolff v. McDonnell* in situations to determine whether a prisoner's presence represents a threat to security would tend to convert the process into an adversary proceeding or to equate it with a determination of guilt. *Greenholtz*, 442, U.S. at 15-16. Decisions to transfer a prisoner to administrative segregation, like decisions to suspend a student from public school, are not conducive to involved, adversary proceedings. In *Goss* the Court held that a student must be given an informal opportunity

to be heard before he is suspended from school. The Court did not require an " 'elaborate hearing' before a neutral party, but simply 'an informal give-and-take between student and disciplinarian' which gives the student 'an opportunity to explain his version of the facts.' " *Ingraham*, 430 U.S. at 693 (White, J., concurring, quoting *Goss*). The weekly and thirty-day reviews by the Program Review Committees of the Pennsylvania Bureau of Correction provide this type of process for such subjective and evaluative decisions as to whether a prisoner is a security threat.

The judgment by the petitioners and the amici that non-disciplinary transfers conducted without extensive procedures serve the important governmental interest of maintaining institutional security must be viewed in light of the problems within the prisons. The "problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions." *Wolfish*, 441 U.S. at 547. Due process "is flexible and calls for such procedural protections as the particular situation demands." *Matthews v. Eldridge*, 424 U.S. at 334; *Morrissey v. Brewer*, 408 U.S. at 481. The fourteenth amendment does not protect against all deprivations of liberty but only against those done without due process of law. *Parratt v. Taylor*, 451 U.S. 527 (1981). When the three factors of *Eldridge* are applied to the process provided to the respondent in this case, the Court should conclude that the requisites of due process have been met.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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APPENDIX

37 PENNSYLVANIA CODE, CHAPTER 95

CONDUCT

Source

The provisions of these §§95.101—95.107 adopted September 22, 1972, 2 Pa.B. 1771, amended February 10, 1977, 7 Pa.B. 442, unless otherwise noted.

§95.101. Scope and purpose.

(a) Institutional life shall be governed by standards of behavior designed to promote correctional objectives and to maintain the general welfare of the institutional community. The laws of this Commonwealth, the rules and regulations of the Bureau of Correction, and of the institution, are a part of the standards of behavior governing each institution.

(b) Behavior which deviates from such standards shall be handled by staff in the manner prescribed by these provisions. Such behavior shall be evaluated within the context of the total treatment plan of the individual, the effect of such behavior upon others, and its consequences for the good order of the entire institution.

(c) The methods used by staff shall be for the purpose of bringing about voluntary compliance with the standards prescribed. Sanctions shall be imposed only when necessary and in the degree necessary to regulate the unacceptable behavior.

Cross References

This section cited in 37 Pa. Code §95.102a (relating to misconducts).

§95.102. Publication of standards of behavior.

Rules and regulations which define expectations and prohibitions and which apply throughout the Bureau shall be established in writing in the form of administrative directives issued jointly by the Attorney General and Commissioner of Correction. Rules and regulations pertinent to each institution which comport with the Administrative Directives shall be established in writing by the respective superintendents upon approval of the Commissioner of Correction. The above rules and regulations shall be as relevant to the norms of the general society as the special problems of group life in the institution shall permit. They shall be published by the distribution of individual copies to each staff member and to each inmate and posted on bulletin boards. They shall be fully explained in inmate orientation sessions, staff meetings, and other training.

Cross References

This section cited in 37 Pa. Code §95.102a (relating to misconducts).

§95.102a. Misconducts.

(a) *General.* Behavior which constitutes any of the misconducts set forth in this section shall be deemed a violation of rules and regulations in all Commonwealth correctional facilities. Such misconduct, classified as Class 1 or Class 2 in accordance with the following list, shall subject the inmate to the pro-

cedures of these §§95.101—95.108 of this title (relating to conduct).

(b) *Class 1 Misconducts.* Class 1 misconducts shall include the following:

(1) Murder-manslaughter.
(2) Escape.
(3) Possession of or introduction of contraband or implements of escape.
(4) Carrying a deadly weapon.
(5) Arson.
(6) Robbery.
(7) Burglary.
(8) Theft.
(9) Tampering with, destroying, or damaging property.
(10) Sodomy.
(11) Indecent exposure.
(12) Rioting or inciting to riot.
(13) Conspiracy to escape, riot, or disrupt normal institution routine that could result in bodily injury to personnel or inmates.
(14) Bribery of an employe.
(15) Threatening an employe or inmate with bodily harm or injury.
(16) Assaults and fighting.
(17) Adulteration of any food or drink.
(18) Refusing to obey an order.
(19) Possession of or use of dangerous or controlled substances.
(20) Refusing to work.
(21) Violating a condition of pre-release program.
(22) Breaking restriction or quarantine.

(23) Intoxication.

(24) Making fermented beverages or possession of materials to manufacture fermented beverages.

(25) Lying to an employe.

(26) Conducting a gambling operation.

(27) Unauthorized use of mail or telephone.

(28) Conduct with a visitor in violation of posted regulations.

(29) Presence in an unauthorized area.

(30) Loaning any property for profit.

(31) Insolence or disrespect toward a staff member.

(32) Possession of stolen property.

(33) Violations of Administrative Directives not specifically enumerated.

(34) Other felonies and misdemeanors not specifically enumerated.

(35) Repeated violations of Class 2 Misconducts.

(c) *Class 2 Misconducts.* Class 2 misconducts shall include the following:

(1) Body punching, horseplay.

(2) Taking unauthorized food from dining room, kitchen or officer's mess.

(3) Possession of unauthorized clothing.

(4) Tattooing and other forms of self-mutilation.

(5) Failure to report to work or unexcused absence from work.

(6) Loaning or borrowing property except legal material.

(7) Failure to follow safety and sanitation regulations regarding inmate's person, quarters, and equipment.

(8) Failure to stand count or interference with count.

(9) Smoking where prohibited.

(10) Any violation of rule or regulation contained in the inmate handbook not specifically enumerated in this subsection.

(d) *Attempted misconducts.* Attempts to commit any of the misconducts set forth in this section where the intent to do the prescribed act is clear and the inmate has taken substantial steps toward its completion, may be charged under the applicable misconduct.

Source

The provisions of this §95.102a amended September 29, 1978, 8 Pa.B. 2682. Immediately preceding text appears at serial pages (32677) and (32678).

§95.103. Procedures.

(a) Behavior problems which may be resolved by immediate counseling, warning, or verbal reprimand shall be dealt with accordingly by the staff person involved. More serious violations shall be the subject of a Misconduct Report.

(b) The Misconduct Report, a four-sheet snap set, shall in each case be distributed as follows:

(1) One copy shall be given directly to the inmate, whenever possible by the staff member who writes the Misconduct Report after approval by the ranking Correctional Officer on duty that

the Misconduct Report has been properly written. No action on the Misconduct Report will be taken unless this is done. The inmate shall receive the copy as soon as possible, and, if placed in prehearing confinement, no later than three hours after such confinement begins.

(2) One copy shall be retained by the staff member who wrote the Misconduct Report.

(3) A third copy shall be forwarded to the Deputy Superintendent for Treatment Services.

(4) The original shall be forwarded to the Chairman of the Hearing Committee and, following disposition, will be retained in the Form JBC-15.

(c) Misconducts shall be referred to the Hearing Committee which shall be composed of the chairman who shall be the permanent member—Major or Captain of the Guard—and a Casework Supervisor, and a school or vocational supervisor, both of whom may rotate periodically. In the absence or lack of any of the foregoing members, the Superintendent shall designate an appropriate substitute. The Hearing Committee shall not include any participants in the incident or incidents from which the charges arise.

(d) The procedure for handling misconducts shall be as follows:

(1) The inmate shall be informed in writing of the charge and given a specific date for a hearing which shall be held not less than 24 hours after receipt of this notice but within six days.

(2) The inmate shall be permitted assistance in presenting his case from either any staff

member or any inmate in general population status, provided that such staff member or inmate is willing to serve in such an advisory capacity.

(3) The inmate shall be permitted to meet with the person he chooses for an appropriate length of time before the hearing.

(4) The inmate shall be permitted to call witnesses at the hearing. They shall be regulated by the Chairman of the Hearing Committee based on their relevance to the case. No inmate can be forced to be a witness against his will.

(e) The Hearing Committee shall conduct the hearing as follows:

(1) The charge and alleged facts in support of the charge shall be read and fully explained by the Chairman. The staff member writing the Misconduct Report may be present if he wishes and may call witnesses to support his claim; however, in cases of factual conflict, when the Hearing Committee deems it necessary to resolve the dispute, they shall compel the staff member's presence and may continue the hearing until he can be present.

(2) The inmate shall be permitted to admit or deny the charges and to give his version which shall be recorded on the misconduct form by a member of the Hearing Committee.

(3) The inmate may present information available to him and to others, with help from whomever he has chosen to assist him.

(4) The Committee members may interrogate the person making the report, the inmate, and others as necessary.

(5) The inmate may question the staff member charging him, if the staff member is present, and other witnesses against him. The extent of the questioning shall be controlled by the Chairman of the Hearing Committee as considerations of relevancy, security, and other valid considerations dictate.

(6) A written summary of the hearing will be prepared which will include the facts relied upon by the Hearing Committee to reach its decision and the reasons for the decision. A copy of the written summary will be given to the inmate. The inmate may, if he wishes, submit a concise summary of the hearing, which summary shall be made a permanent part of the file.

(7) After the decision is reached by the Committee, the inmate charged shall be called before the Committee to hear the decision and to be advised of its rationale.

(8) A Committee decision shall be based upon a preponderance of the evidence. Before action other than dismissal of the charges is taken, the Committee must be satisfied that, more likely than not, the inmate has committed a misconduct.

(9) The inmate shall be informed that the decision of the Hearing Committee will be formally reviewed by the Program Review Committee upon the inmate's request. The inmate shall indicate on the Misconduct Report that he has been advised of his right to request a formal review and so attest by his signature; if the inmate refuses to sign, two witnesses shall sign to attest that the inmate was advised of his right to request

a formal review. The inmate shall be advised that he has 15 days to submit a written request for a formal review.

(f) The Hearing Committee may take the following actions:

(1) In cases where the violation is proved and constitutes a Class 2 Misconduct:

(i) Reprimand, or recommend counseling.

(ii) Suspend privileges for up to 15 days.

(iii) Assess fair repayment for property willfully destroyed.

(iv) Change cell assignment; excluding placement in Administrative Custody or Disciplinary Custody.

(v) Submit a recommendation for transfer to another institution to the Program Review Committee.

(2) In cases where the violation is proved and constitutes a Class 1 Misconduct:

(i) Reduce classification to Class 2 Misconduct and take any action permitted in paragraph (1) of this section.

(ii) Take any action permitted for Class 2 Misconducts in paragraph (1) of this subsection.

(iii) Change cell assignment including placement in Close or Maximum Disciplinary Custody. Such placement will be reviewed weekly by the Program Review Committee as provided for in subsection (g) of this section and shall have a specified maximum duration for each misconduct not to exceed six months.

(iv) Suspend privileges for specified period of time.

(v) Reclassify custody or program status.

(g) A Program Review Committee shall function under the following provisions:

(1) The Program Review Committee shall be composed of the Deputy Superintendent for Operations, the Deputy Superintendent for Treatment Services, and the Classification and Treatment Supervisor. In the absence or lack of any of the foregoing members, the Superintendent shall designate an appropriate substitute.

(2) The inmate shall be entitled to have any decision of the Hearing Committee reviewed by the Program Review Committee at his request.

(3) The Program Review Committee shall review, at one-half of the sentence served or weekly, whichever is less, those cases of inmates detained in Administrative Custody or Disciplinary Custody and shall decide whether continued custody in those units is appropriate and necessary in each case. This decision will be based upon a review of the notes and recommendations of the counselor, additional entries made on the inmate's record regarding his attitude and actions since placement in the restricted housing or since the last weekly review, and of the misconduct which was the basis of the placement for those cases in Disciplinary Custody.

(4) The Program Review Committee, as a Committee, shall interview in person at least once every 30 days, those inmates detained in Ad-

ministrative Custody or Disciplinary Custody. The determination of whether continued confinement is warranted will be based upon a review of the counselor's notes and recommendations, psychological and psychiatric reports when available, recommendations by other staff and their written observations regarding his attitude and actions, and his attitude and actions during the interview. If the inmate is in Disciplinary Custody, the gravity of the misconduct must also be considered. When the Program Review Committee determines that continued confinement is warranted, the inmate shall be given a written statement of the decision and its rationale. In cases of inmates detained in this status for more than 30 days, it shall be reported to the Commissioner of Correction by the Superintendent with his comments as well as those of the Program Review Committee and the rationale for such status and particular programs prescribed shall be stated. All inmates continuously confined in Administrative and Disciplinary Custody for a period of one year shall be given thorough annual psychological and psychiatric examination during this confinement.

(5) The Program Review Committee, in releasing an inmate from Disciplinary Custody, must determine whether the inmate is a threat to other inmates, to staff, or to himself, or poses a threat of escape and all available records on the inmate shall be reviewed and considered to make this decision. In cases where such a determination is made, the Program Review Committee may assign the inmate to either Close or Maximum Ad-

ministrative Custody in cases where the inmate was released from Maximum Disciplinary Custody or to Close Administrative Custody in cases where the inmate was released from Close Disciplinary Custody. This determination will be made in writing and a copy will be provided to the inmate.

(h) Scheduling and procedure for conducting appeal hearings by the Program Review Committee:

(1) Upon receiving a request from the inmate for review of the Hearing Committee's decision, the Program Review Committee shall notify the inmate and the Chairman of the Hearing Committee of the time and date set for the review. The inmate may be excluded at the discretion of the Program Review Committee.

(2) The inmate, with assistance if desired, shall present his objections to the decision of the Hearing Committee. These may be submitted in written form.

(3) The Chairman of the Hearing Committee shall present the reasons for the decision.

(4) The Program Review Committee may question both the inmate and the Chairman of the Hearing Committee regarding the facts and the rationale for the decision.

(5) The Program Review Committee shall take the matter under advisement and promptly render the decision, together with the rationale, to the inmate and the Chairman of the Hearing Committee.

(6) The inmate shall be given a written statement of the decision and its rationale.

(7) All decisions of the Program Review Committee shall be reviewed by the Superintendent for his sustaining the decision or amending or reversing the decision in favor of the inmate.

Source

The provisions of this §95.103 amended September 29, 1978, 8 Pa.B. 2682. Immediately preceding text appears at serial pages (32678) to (32682).

Cross References

This section cited in 37 Pa. Code §95.104 (relating to behavior control and confinement); 37 Pa. Code §95.102a (relating to misconducts); and 37 Pa. Code §95.107 (relating to care and treatment).

Notes of Decisions

The Program Review Committee must adopt objective conduct guidelines, give the inmate some idea of what conduct is required of him or her and consider periodically updated psychological reports. *United States ex rel. Hoss v. Cuyler*, 452 F.Supp. 256 at 291—295 (E.D.Pa. 1978).

Continued segregated confinement without a hearing for the first five days after transfer from another prison is not a denial of due process. *United States ex rel. Hoss v. Cuyler*, 450 F.Supp. 256 at 292—293 (E.D.Pa. 1978).

§95.104. Behavior control and confinement.

(a) *General.* As the result of a general institutional disturbance or an incident which could result in

the loss of control, all inmates may be confined to their own cells upon approval of the officer in charge of the institution. This action may be taken pending the restoration of order and a determination that normal institutional operations can be safely resumed.

(b) *Individual.* Individual behavior control and confinement shall conform with the following:

(1) An inmate who has allegedly committed a Class 1 Misconduct may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution, not routinely but based upon his assessment of the situation and the need for control pending application of procedures under §95.103 of this title (relating to procedures).

(2) Depending upon the situation, and the need for control, an inmate who has allegedly committed a Class 2 Misconduct may be removed immediately from his job, restricted in activities, or confined to his own cell upon approval of the officer in charge of the institution, not routinely but based upon his assessment of the situation and the need for control pending application of procedures under §95.103 of this title (relating to procedures). If an inmate has been confined to his cell pending a hearing, he shall continue to enjoy use of his personal property such as his own television and radio, except when the alleged misconduct involves the misuse of the item of personal property.

(3) An inmate may be temporarily confined to Close or Maximum Administrative Custody in an investigative status upon approval of the officer

in charge of the institution where it has been determined there is a threat of a serious disturbance, or a serious threat to the individual or others. The inmate shall be notified in writing as soon as possible that he is under investigation and that he will receive a hearing if any disciplinary action is being considered after the investigation is completed. An investigation shall begin immediately to determine whether or not a behavior violation has occurred. If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated but in all cases within ten days.

(4) An inmate who requests self-confinement may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution pending review by the Program Review Committee. The Program Review Committee shall document the request by the inmate as well as the reasons for the request and shall determine whether Close or Maximum Administrative Custody is warranted by a review of the reasons and whether continuing confinement is justified or whether a transfer should be recommended.

Source

The provisions of this §95.104 amended September 29, 1978, 8 Pa.B. 2682. Immediately preceding text appears at serial page (32683).

Cross References

This section cited in 37 Pa. Code §95.102a (relating to misconducts).

§95.105. [Reserved].

§95.106. Restricted housing categories.

The Bureau of Correction for purposes of this chapter shall recognize the following restricted housing categories for inmates within Commonwealth correctional institutions:

(1) *Administrative Custody.* For inmates requiring closer supervision or protection than is provided in general population and for temporary assignment of inmates pending further classification. Maximum Custody involves housing in the most secure facilities available in the insitution and includes the most intensive scrutiny of all matters pertaining to security and the most restrictive regulation of inmate mobility. Close Custody involves housing in more secure facilities than those used for general population and restricted mobility. The degree of security and restriction of mobility is less than the degree present in Maximum Custody. Maximum or Close Custody may be designated based on the intensity of supervision and control required.

(2) *Disciplinary Custody.* For inmates found by the Hearing Committee to have committed Class 1 Misconducts. Maximum Custody involves housing in the most secure facilities available in the institution and includes the most intensive scrutiny of all matters pertaining to security and the most restrictive regulation of inmate mobility. Close Custody involves housing in more secure facilities than those used for general population and restricted mobility. The degree of security and restriction of mobility is less than the degree

present in Maximum Custody. Maximum or Close Custody may be designated based on the intensity of the supervision and control required as well as the nature and the particulars of the offense committed.

Cross References

This section cited in 37 Pa. Code §95.102a (relating to misconducts).

Notes of Decisions

Indefinite segregated confinement based on an inmate's history and record of violent acts is administrative rather than punitive in nature when the purpose of the segregation is to prevent possible outbreaks of violence. *United States ex rel. Hoss v. Cuyler*, 452 F.Supp. 256 at 285 (E.D.Pa. 1978).

§95.107. Care and treatment.

(a) Administrative Custody housing shall be designated as Close and Maximum and will be specified groups of cells in a designated section or sections of the institution as the physical plant permits.

(1) The purpose of placing an inmate in this unit shall be to maintain the safety of the institution by segregating an individual who poses a threat to other inmates, to staff, or to himself, poses an escape risk, or needs protection from other inmates. The decision to place an inmate in this custody must comply with §95.103(g)(4) of this title (relating to procedures), or §§95.104(b)-(1), (3), or (4). Determination of whether Close or Maximum Administrative Custody is necessary will be made by the Program Review Committee.

(2) The inmates therein shall have all the rights and privileges accorded to the general population except for freedom to move about the institution, freedom to engage in programs with the general population, the use of civilian clothing, the use of items specifically found by the Program Review Committee to be a security hazard, and the use of individual radios and televisions. However, the use of battery-powered radios may be permitted with the express approval of the Program Review Committee.* All other personal property which is permitted in general population will be permitted in Administrative Custody.

(3) The inmate requesting the use of an item or to participate in a program permitted in general population not expressly excluded above shall initiate such a request through the request slip process to the Program Review Committee who shall respond within one week.

(4) The Program Review Committee may permit a limited release program from Close Administrative Custody as a gradual process to return to general population status.

(b) Disciplinary Custody housing shall be designated as Close and Maximum and will be

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* While the published regulation precludes the use of individual radios and televisions with the possible exception of battery powered radios, the regulation as distributed and in use in the institutions permitted televisions and radios in Administrative Custody with the express approval of the Program Review Committee. This modification, however, is neither a part of the record below nor identified as a loss by respondent.

specified groups of cells in a designated section or sections of the institution as the physical plant permits. The initial determination of whether Close or Maximum Disciplinary Custody is necessary will be determined by the Hearing Committee to be later reviewed on a weekly basis by the Program Review Committee as outlined in §95.103 of this title (relating to procedures).

(1) The purpose of placing an inmate in this unit shall be to supervise and control serious disciplinary problems.

(2) Inmates confined therein shall not be permitted freedom to move about the institution or to engage in programs with the general population. Inmates in this confinement will be permitted those items, or use of those items, necessary to maintain an adequate level of personal hygiene as well as a reasonable amount of personal legal materials and correspondence. Inmates in this unit will also be permitted to visit with their approved visitors consistent with institutional and Bureau regulations, to correspond consistent with Bureau Directives, and will be issued those items not already possessed by the inmate necessary to maintain personal hygiene, to correspond and prepare personal legal documents; also three cigarettes or their equivalent per day if requested. Any privilege may be curtailed at the express decision of the Hearing Committee after a Hearing.

(c) Inmates in categories as set forth in subsections (a) and (b) of this section shall receive interviews at least weekly by the institution's professional treatment staff. The Program Review Committee shall

release an inmate from Administrative Custody or Disciplinary Custody as soon as appropriate.

(d) All misconducts committed while confined in these categories must be written up and disposed of by the Hearing Committee procedure.

(e) A shift commander, chaplain, and a medical doctor shall visit inmates in Maximum Administrative Custody and Maximum Disciplinary Custody each day and such visits shall be recorded in the logs.

(f) Every 30 days the Superintendent shall personally review the case of each inmate separated from the general population for 30 days or more (not less than once every 60 days). He shall maintain a written report of his findings in each such case and together with a copy of the Program Review Committee's report shall submit them to the Commissioner monthly.

Cross References

This section cited in 37 Pa. Code §95.102a (relating to misconducts).

Notes of Decisions

Indefinite segregated confinement because of a history and continued record of violent acts does not constitute cruel and unusual punishment if the inmate has the opportunity for exercise and education and access to work programs, even though there is some evidence that such confinement may cause the inmate's psychological condition to deteriorate. *United States ex rel. Hoss v. Cuyler*, 452 F.Supp. 256 at 286–287 (E.D.Pa. 1978).

Because the regulations provide that the inmate should be released to the general prison population as soon as appropriate, an inmate has a Fourteenth Amendment liberty interest in freedom from segregated confinement. *United States ex rel. Hoss v. Cuyler*, 452 F.Supp. 256 at 289–290 (E.D.Pa. 1978).

§95.108. Suspension of provisions.

In an extended emergency situation or extended disruption of normal institution routine, any provision or section of this directive may be suspended by the Superintendent for a specific period of time with the approval of the Commissioner of Correction.

Cross References

This section cited in 37 Pa. Code §95.102a (relating to misconducts).

Respondent's Brief

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No. 81-638

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOWELL D. HEWITT, Superintendent; B. B. KYLER, C.O. III: R.E. STOTELMYER, Major; B. K. SMITH, Counselor III; K. R. HILEMAN, Farm Manager; D. R. ERHARD, Deputy Superintendent for Treatment; T. W. HENRY, Director of Treatment; W. W. MATEER, C.I. Manager; SCI-HUNTINGDON,

Petitioners,

v.

AARON HELMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does the taking of an inmate from the general prison population and placing him in potentially indefinite pre-disciplinary hearing administrative segregation, under conditions identical to disciplinary custody, implicate any State created liberty interests under Pennsylvania law or implicate any liberty interests directly from the Due Process Clause of the Constitution?

2. Assuming liberty interests are created, what process is necessary to reduce the risk of error and avoid arbitrary decision making, when considering the governmental and private interests involved?

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STATEMENT OF THE CASE

This case involves a former prison inmate named Aaron Helms, the Respondent, who was charged with a disciplinary rule infraction (misconduct) arising out of a disturbance at the State Correctional Institution (SCI) at Huntingdon, Pennsylvania, on December 3, 1978. Respondent was held in administrative custody segregation for 51 days, awaiting a disciplinary hearing.[1] (J.A. 60a, 62a, 69a).

The physical attributes and conditions of administrative custody are virtually identical to disciplinary custody,[2] as was found by the Court of Appeals. *Helms v. Hewitt,* 655 F.2d 487, 494 (3d Cir. 1981) (Pet. Cert. 14a); (J.A. 12a, 35a-36a).

Prison officials did not contradict or file counter affidavits to Helms' statements concerning the conditions of his confinement in administrative or disciplinary segregation (restrictive custody). Fed. R. Civ. P. 56(e). Besides losing his prison job and pay therefore, he stated these conditions of segregation included:

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[1]The Pennsylvania Bureau of Correction's internal administrative directive concerning administrative and disciplinary custody, which is distributed in the Institution to inmates and staff, is contained in BC-ADM 801 (Rev. 10/78) (a copy of which appears in the Appendix to this Brief). This Directive is codified as a regulation in 37 Pa. Code §95.101 *et seq.* (A copy of which appears in the Brief for Petitioners at 30-50).

[2]Whether restrictive custody is denominated disciplinary or administrative, the degree of security or restriction of mobility in both custody classifications is subdivided into maximum or close. Maximum administrative or disciplinary custody reflects the highest level of supervision or control. BC-ADM 801 ¶V [37 Pa. Code §95.106]. Freedom of movement, by definition in the directive or regulation, in maximum administrative custody, is identical with freedom of movement in maximum disciplinary custody. *Id.* The same principle of identity of freedom of movement would apply to close administrative custody and its disciplinary counterpart. *Id.*

> [N]o access to vocational, educational, recreational,[3] and rehabilitative programs as I would have had while out in the general population. Exercise was limited to between five and ten minutes a day and was often only three or four days a week. Showers were virtually nonexistent in segregation in December and January. The changing of clothes was also only once or twice a week while I could have changed more often in population. Had I been in general population I would have had access to various exercise facilities such as the gym and the yard and would have been able to do this for most of the time out of my cell which would have been approximately 14 hours a day. While in segregation I only got out of my cell for a few minutes for exercise, showers and an occasional visit. I was virtually confined there 24 hours a day otherwise. I had been subject to racial slurs and constant harassment and threatened with being given an institutional misconduct if I as much as talked in a normal tone.

(J.A. 35a).

The Petitioner-Defendants were all correctional officers or civilian employees of the Pennsylvania Department of Justice, Bureau of Correction, working at SCI Huntingdon, at the time of the events involved in this case. (J.A. 58a-59a, 68a).

On December 3, 1978 at approximately 7:50 p.m., a disturbance broke out at SCI Huntingdon which resulted in the injury of several correctional officers and inmates, which disturbance was quelled or order restored that same evening.

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[3]As Respondent had no access to recreation and since there is no evidence in the record that the Program Review Committee approved his retaining a television or radio in his cell, there is no basis for Petitioners implying he retained such (Brief for Petitioner at 47n*). See the Affidavit of Respondent and the status review of the Program Review Committee of January 2, 1979 (J.A. 13a-15a, 35a).

(Answer ¶6 to Amended Complaint) (J.A. 58a, 68a). The State Police arrived at the Institution on December 3, 1978 (J.A. 32a, 50a-53a); *Helms,* 655 F.2d at 440 (Pet. Cert. 3a). The entire inmate population was then confined to their cells the remainder of the evening but the general inmate population (those not in segregation or restrictive custody on B-Block)[4] were released from confinement in their cells on December 4, 1978. (Answer ¶7 Amended Complaint) (J.A. 59a, 68a). An investigation was begun by the Bureau of Correction and State Police to see if any misconduct (disciplinary) regulations or criminal laws were violated. (Answer ¶8 to Amended Complaint) (J.A. 59a-60a, 69a).

The exhibits attached to Mr. Helms' First Set of Requests for Admissions indicated, according to internal documents and statements of Superintendent Hewitt, Commissioner William B. Robinson and the Bureau of Correction itself that the Institution returned to normal by December 5, 1978 at the latest. *Helms,* 655 F.2d at 489-490 (Pet. Cert. 3a); (J.A. 52a-57a).

On December 3, 1978 at approximately 10:00 p.m., Mr. Helms was placed in administrative custody in a disciplinary cell, on B-Block at SCI Huntingdon, after questioning by the Pennsylvania State Police[5] (J.A. 12a, 16a, 60a, 69a); *Helms,* 655 F.2d at 490 (Pet. Cert. 3a). He was being held there pending investigation for alleged involvement in the disturbance that evening (Answer ¶9 to Amended Complaint) (J.A. 60a, 69a). The following day Respondent

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[4]B-Block is also known as the restrictive housing unit (R.H.U.) and the segregation unit. (J.A. 32a, 38a).

[5]Administrative or disciplinary custody pending the arrival of the State Police is contained in internal administrative directive BC-ADM 004 (as amended Aug. 5, 1975). This directive is codified as a regulation in 37 Pa. Code §95.1 *et seq.*

Helms was charged with an institutional misconduct (No. 90908) for allegedly assaulting officers and conspiracy to disrupt normal institutional routine by forcibly taking over the control center (Answer ¶ 10 to Amended Complaint) (J.A. 37a-38a, 60a, 69a).

On December 8, 1978, Respondent was merely informed by an Institutional disciplinary tribunal known as the Hearing Committee (HC) that his disciplinary case and confinement status was continued pending completion of the investigation by the State Police pursuant to administrative directive 004, because of insufficient evidence. (J.A. 39a-40a, 60a, 69a). The written document recording the HC action of December 8, 1978 indicated it was a misconduct report. (J.A. 39a). On December 11, 1978, Mr. Helms was charged criminally in alleged violation of the laws of Pennsylvania with assaulting correctional officer Rhodes and riot, which charges were subsequently dismissed (Answer ¶ 12 and Amended Answer ¶ 14 to Amended Complaint) (J.A. 60a, 61a, 69a, 77a).

On January 2, 1979 Respondent was informed by an Institutional Program Review Committee (PRC)[6] that his present restricted administrative status was continued (Answer ¶ 13 to Amended Complaint) (J.A. 13a-15a, 60a, 69a). The PRC was composed of Petitioners Erhard, Henry and Mateer (*Id.*). The course of action by the PRC was taken

[6]The PRC in performing its 30 day status review of those in disciplinary or administrative custody functions pursuant to BC-ADM 801 ¶ III.G. [37 Pa. Code §95.103(g)]. There is no provision in a PRC review for written notice or input from the inmate in terms of presenting evidence and witnesses in his behalf and questioning his accusers, as there is in a disciplinary (misconduct) hearing before a HC. There is no provision for a written statement of the evidence relied upon. *Compare* BC-ADM 801 ¶ III.D.E. [37 Pa. Code §95.103(d) (e)], which sets forth misconduct procedures before the HC.

because of the preliminary hearing on the state criminal charges scheduled for the following day. *Helms,* 655 F.2d at 490-491. (Pet. Cert. 5a); (J.A. 11a-14a). The PRC noted in this status review that Helms was to continue in "disciplinary custody close"[7] (J.A. 14a). Petitioner Hewitt concurred in this PRC decision.[8] (Answer ¶ 13 to Amended Complaint) (J.A. 15a, 60a-61a, 69a).

On January 19, 1979, the Respondent was charged by Petitioner Kyler with the Institutional misconduct of assault, on Sgt. Phillips in No. 90986 arising out of the disturbance of December 3, 1978. (Answer ¶ 15 to Amended Complaint) (J.A. 41a-43a, 61a, 69a).

On January 22, 1979, Helms was found guilty by an Institutional HC on No. 90986, composed of the Petitioner prison officials Stotelmyer, Smith and Hileman on the misconduct charges of assaulting Sgt. Phillips. (J.A. 43a-44a, 61a, 69a). The misconduct charges of assault and conspiracy of December 4, 1978, in No. 90908 were dismissed with no action having been taken on them or a violation found (J.A. 44a). Mr. Helms was sentenced on January 22, 1979 to six months in disciplinary custody or segregation effective from December 3, 1978. (Answer ¶ 18 to Amended Complaint) (J.A. 44a, 61a, 69a).

The action of the Institutional HC of January 22, 1979 was the first adjudication or finding of Respondent's alleged misconduct arising out of the Institutional disturbance of

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[7]Despite Mr. Helms' confinement status being labeled disciplinary custody on January 2, 1979, he was not found guilty of any misconduct charges until January 22, 1979. (J.A. 62a, 69a).

[8]Superintendent Hewitt was responsible for reviewing the PRC decision pursuant to BC-ADM 801 ¶ III.H.7, [37 Pa. Code §95.103(h)(7)] and he was ultimately responsible for Helms' disciplinary or custody status. 61 P.S. §650; 71 P.S. §§304, 306 (J.A. 62a, 69a).

December 3, 1978, even though he had been confined in administrative custody since that date. (Answer to ¶ 19 to Amended Complaint) (J.A. 34a, 62a, 69a).

January 22, 1979 was the first opportunity for inmate Helms to have a disciplinary hearing preceded by notice where evidence and witnesses could be presented in his behalf and where he would receive a written statement by the fact-finder as to the evidence relied upon and the reasons for the action taken. (J.A. 41a-46a).

In response to Respondent's Second Set of Requests for Admissions, Petitioners admitted the truth of having provided misconduct or disciplinary hearings arising out of the December 3, 1978 incident and resulting in HC actions, adjudications or findings of guilt or innocence to 19 other inmates prior to January 22, 1979 (J.A. 65a-66a, 75a). These prison officials also admitted the truth of having provided misconduct or disciplinary hearings resulting in HC actions, adjudications, or findings of guilt or innocence to 215 inmates at SCI Huntingdon between the period December 3, 1978 and January 21, 1979. (J.A. 66a-67a, 75a).

There is no evidence in the record that Respondent Helms received any weekly status reviews by the PRC or anyone else.

In the District Court's Memorandum in support of its Order of August 15, 1980, there was no evidence that the Court examined Pennsylvania prison regulations to determine whether liberty interests arose from that source (Pet. Cert. 14a-15a, 37a-45a).

Contrary to the Petitioners' assertion, the Court of Appeals did not "establish a rule that any written guidelines for State action affecting prisoners creates an expectation that those guidelines will be followed and that that

expectation automatically creates an entitlement and a liberty interest for purposes of due process" (Brief for Petitioners at 6). Indeed, Petitioners cite to no page of the Third Circuit Opinion holding such a rule was created.

What the Court of Appeals did hold was that under the Pennsylvania regulations governing administrative custody in this case, a liberty interest protected by due process was created (Pet. Cert. 17a-20a). This holding was based on a determination that "the effect of these regulations is to limit segregation in Administrative and Disciplinary Custody to particular classses of inmates who meet objective criteria set out in the rules." *Helms,* 655 F.2d at 496-497 (Pet. Cert. 17a).

The Court of Appeals did not address the issue of whether a failure of the State to follow their own regulations, in and of itself, violated due process. *Helms,* 655 F.2d at 491 n.5 (Pet. Cert. 7a).[9]

The Third Circuit then remanded to see if the December 8, 1978 convening of the HC, as claimed by Petitioners, met the procedural requisites of *Enomoto v. Wright,* 434 U.S. 1052 (1978), *aff'd mem., Wright v. Economoto,* 462 F.Supp. 397, 404-405 (N.D. Cal. 1976), and *Wolff v. McDonnell,* 418 U.S. 539, 565-570 (1974).[10] *Helms,* 655

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[9]The Third Circuit in invaliding the misconduct conviction at the January 22, 1979 disciplinary hearing, did not preclude the use of confidential informants, but merely held that the manner of use against Helms violated principles of fundamental fairness because there was no evidence at the disciplinary hearing that the informant had any personal knowledge of the incident or that he was credible and his information reliable. *Helms,* 655 F.2d at 501-503 (Pet. Cert. 28a-33a). No other evidence was presented at the misconduct hearing (J.A. 43a-46a). Petitioners do not contest this finding in this Court. (Brief for Petitioners at 7 n.6).

[10]The minimum procedures required were 24 hour advance written notice of the charges of misconduct; a written statement by the fact-

(continued)

F.2d at 500-501 (Pet. Cert. 26a-28a). It was this factual remand that Respondent claimed made this case not ripe for a decision and justified denying the Writ of Certiorari. (Brief in Oppos. to Pet. Cert. at 9-10). See, *Brotherhood of Locomotive Firemen and Engineerman v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967).

Finally, the Court of Appeals remanded to see if there was any possibility of a non-judicial solution to the case pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S. C.A. § § 1997-1997j (Supp. 1981). *Helms*, 655 F.2d at 503 n.15 (Pet. Cert. 34a, n.15). Respondent also asserted, that if a non-judicial solution was possible the Writ should not be granted. (Brief in Oppos. to Pet. Cert. at 9-10). See *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

SUMMARY OF ARGUMENT

The Court of Appeals recognized that liberty interests or entitlements can stem directly from the Due Process clause of the Constitution or can be created as a creature of the State. *Vitek v. Jones*, 445 U.S. 480, 493-494 (1980); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); *Helms*, 655 F.2d at 493-494 (Pet. Cert. 11a-13a). The Third Circuit applied these entitlement theories in analyzing whether any liberty interests were created from the prison regulations and directives at issue. *Id.* at 493-497 (Pet. Cert. 13a-20a).

(footnote continued from preceding page)

finders as to the evidence relied on and reasons for the disciplinary action; an opportunity to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals; and assistance from a prison staff member or an inmate where the individual facing the charges is illiterate or the issues complex.

This case arises from a single prison incident in a disciplinary context (pre-disciplinary hearing administrative confinement, while under investigation). Petitioners' regulations and directives not only limit administrative confinement to those defined within standards set out in their rules, but the directives and regulations state that they establish expectations and prohibitions on the part of those concerned. BC-ADM 801 ¶II [37 Pa. Code §95.102]. *Enomoto v. Wright,* 434 U.S. 1052 (1978), *aff'd mem., Wright v. Enomoto,* 462 F.Supp. 397, 403 (N.D.Cal. 1976). The regulations in question were issued to comply with a Consent Decree the State voluntarily entered and agreed to abide by. *I.C.U. v. Shapp,* C.A. 70-3054 (E.D.Pa. May 22, 1978). The directive/regulation specifically concerning administrative segregation, under investigation, mandates release in all cases within ten days. BC-ADM 801 ¶IV.B.3 [37 Pa. Code §95.104(b)(3)]. Thus, State created entitlements are present. *Wolff v. McDonnell.*

No exigent or other circumstances were present that would have justified dispensing with due process procedural protections to effect administrative segregation, for the length of time involved in this case. *Hughes v. Rowe,* 449 U.S. 5, 11 (1980), *per curiam; Wright v. Enomoto,* 462 F.Supp. at 405. Any criminal proceedings arising out of Respondent's alleged institutional misconduct charge, involve different considerations, not pertinent to institutional disciplinary proceedings and do not justify the delay. *Baxter v. Palimigano,* 425 U.S. 308, 319 (1976). Thus, any interest in dispensing with prison disciplinary proceedings is for the inmate to assert and not prison officials. *Id.*

The indefinite administrative segregation under the conditions involved in this case is so far removed from the normal range of a Pennsylvania prison sentence so that its

nature implicates a liberty interest created directly by the Due Process Clause of the Constitution. *Vitek v. Jones,* 445 U.S. at 494.

Respondent does not seek to take from prison officials their wide discretion in using administrative segregation or to require procedures in urgent circumstances. At most, he seeks to focus that discretion in keeping an individual in indefinite administrative segregation, in the absence of exigent prison conditions.

Decision making in the administrative custody context involves a high risk of error and includes a retrospective factual analysis to see if the conditions justifying initial administrative segregation have been met or that one so confined should be released from this status. The analysis involved should seek to turn subjective impressions or predictions into objective decisions, to avoid arbitrary determinations.

Reported cases in Pennsylvania and in other jurisdictions indicated error or potential abuse of administrative segregation and that it may be effectuated under conditions indistinguishable from disciplinary confinement, but without procedural safeguards.

The requisite procedures to effect administrative segregation, outside of emergency conditions, are similar to what already exists in Pennsylvania for disciplinary segregation, but take into consideration that circumstances surrounding the administrative custody, change, unlike disciplinary confinement, and must not only be justified at its outset, but must continue to be valid in the future. The existing Pennsylvania procedures for disciplinary custody, with the exception of its provision for the questioning of witnesses and disclosure of facts at the hearing are those set forth in *Wolff v. McDonnell,* 418 U.S. at 565-570.[11]

[11]See n.10, *supra.*

In addition, assistance for the inmate at the hearing is necessary, not only because of illiteracy and the complexity of issues, but because of the likelihood of pre-hearing confinement and the inability to gather facts to present a case. Similar procedures need to be mandated after 30 days of administrative custody, but limited in scope to facts occurring within the prior 30 days as reflecting on the original reason for confinement.

These procedures will be shown to have negligible impact on the governmental interest and to not compromise the ability of prison officials to make use of administrative segregation, while at the same time increasing the information available for objective decision making.

ARGUMENT

I.

THE CREATION OF LIBERTY INTERESTS

In the prison context, this Court has recognized that liberty interests giving rise to procedural due process protections can be created by the State. *Wolff v. McDonnell,* 418 U.S. 539, 557 (1974). Depending upon the nature of the interest, liberty interests can also arise directly from the Due Process Clause of the Constitution itself. *Vitek v. Jones,* 445 U.S. 480, 493-494 (1980).

In *Wolff,* the Nebraska statute[12] at issue provided for punishment in two ways, if an inmate engaged in serious misconduct. The inmate's good-time credits, affecting the term of confinement, could be forfeited and he could be

[12] §83-1, 107, Neb. Rev. Stat. (Cum. Supp. 1972).

placed in disciplinary confinement which altered the conditions of incarceration. 418 U.S. at 547. The statute in *Wolff* only required that the inmate was to "be 'consulted regarding the charges of misconduct' in connection with the forfeiture, withholding, or restoration of credit [good-time]." *Id.* at 548.

Justice White, writing for the Court in *Wolff,* went on to hold:

> but here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior .... But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures[13] appropriate under the circumstances and required by the Due Process Clause to insure that the state created right is not arbitrarily abrogated.

Id. at 557.

The *Wolff* analysis of State created liberty interests was applied in the prison transfer situation. *Meachum v. Fano,* 427 U.S. 215 (1976); *Montanye v. Haymes,* 427 U.S. 236 (1976). In both of these cases, no segregated confinement, loss of good time, loss of privileges or disciplinary measures accompanied the transfers. 427 U.S. at 221-222; 427 U.S. at 238.

In *Meachum,* under Massachusetts law,[14] the transfers of inmates from one prison to another were not conditioned upon the occurrence of specified events or conditions or

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[13]See n.10, *supra.*

[14]Mass. General laws. Ann. C127 §97 (1974).

limited to instances of serious misconduct. 427 U.S. at 226-227, 228. Transfers could be made "for whatever reason or for no reason at all." *Id.* at 228. Similarly, in *Montanye,* "The [New York] statute imposes no conditions on the discretionary power to transfer, . . ." 427 U.S. at 243. As a result, no entitlements or expectations on the part of the prisoner were created under State law, so as to require procedural due process protections in effectuating transfers, in either case. *Meachum v. Fano,* 427 U.S. at 228; *Montanye v. Haymes,* 427 U.S. at 243.

More recently in *Vitek v. Jones,* this Court examined State created liberty interests under Nebraska law in transferring an inmate from a prison to a mental health facility. Neb. Rev. Stat. §83-176(2) authorized the placement of a prisoner in "*any* available, suitable and appropriate residence, facility or institution as a place of confinement . . . and transfer . . . from one place of confinement to another [emphasis added]" 445 U.S. at 483. However, this ability to transfer was circumscribed when transfers were contemplated for mental health reasons. Neb. Rev. Stat. §83-180(1) provided that when a designated physician or psychologist finds that an incarcerated person "suffers from a mental disease or defect" and "cannot be given proper treatment in that facility", the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution. . ." 445 U.S. at 483 n.1.

This Court found that §83-180(1) created an "objective expectation firmly fixed in State law" that "adverse action" [transfer to a mental hospital] would not take place "except upon the occurrence of specified behavior [a finding of mental disease or defect that could not be adequately treated in prison], the determination of whether such behavior has occurred becomes critical, and the minimum requirements of

procedural process appropriate for the circumstances must be observed'. *Wolff v. McDonnell,* 418 U.S. at 558." 445 U.S. at 489-390, 491.

Citing *Arnett v. Kennedy,* 416 U.S. 134, 166-167 (1974), the *Vitek* decision noted that while the statute at issue governed the nature of the state created interest, it was not determinative of the procedural protections required. 445 U.S. at 490 & n.6. Thus, the fact that a physician or psychologist made the requisite findings under §83-180(1), did not end the inquiry as to the process due. *Id.*

A second, less apparent source for the genesis of liberty interests is the Due Process Clause itself, which requires an examination of the nature and extent of the loss in question. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

Applying this second source of liberty interests in *Montanye v. Haymes,* this Court held that the Due Process Clause by its own force did not require hearings when an inmate is transferred to another prison, "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, . . ." 427 U.S. at 242. Similarly, in *Meachum v. Fano,* the Due Process Clause itself was not found to give rise to liberty interests requiring procedural protections from transfers because "Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." 427 U.S. at 225. Thus, any substantial loss does not necessarily trigger the protections of the Due Process Clause. *Id.*

However, in *Vitek v. Jones,* this Court looked at the qualitative effect of transfer to a mental hospital with its stigmatizing consequences, involuntary treatment and behavioral modification and recognized that such consequences were not "characteristically suffered by a person

convicted of a crime" or "within the range of conditions of confinement to which a prison sentence subjects an individual." 445 U.S. at 493. As a result, a liberty interest protected by the Due Process Clause was implicated. *Id.* at 494.

This Court has applied this dual theory of entitlements in examining the process due in the prison context where an inmate is in administrative custody (pre-hearing confinement) awaiting a disciplinary hearing, as was involved in this case. *Hughes v. Rowe,* 449 U.S. 5 (1980), *per curiam.* State created rights and liberty interests from the Due Process Clause have also been analyzed in the purely administrative custody situation. *Enomoto v. Wright,* 434 U.S. 1052 (1978), *aff'd mem., Wright v.Enomoto,* 462 F.Supp. 397 (N.D.Cal. 1976). Both the *Hughes v. Rowe* and *Enomoto v. Wright* situations will be discussed more fully *infra.*

The Court of Appeals in this case also recognized that liberty interests steemed from the two sources discussed, *supra, Helms,* 655 F.2d at 493-494 (Pet. Cert. 11a-13a). The Third Circuit applied these entitlements theories in analyzing whether liberty interests were created on the part of the Respondent under the regulations governing his administrative confinement. *Helms,* 655 F.2d at 493-497 (Pet. Cert. 13a-20a). A similar entitlement analysis follows.

II.

PRE-DISCIPLINARY CONFINEMENT AND STATE CREATED ENTITLEMENTS

It is not necessary to a resolution of this case, to consider what liberty interests are created when one is placed in administrative segregation, outside of the disciplinary context. The Respondent was charged with a misconduct

arising out of the December 3, 1978 incident within 24 hours of his placement in administrative segregation, in a disciplinary cell. (J.A. 12a, 16a, 37a, 38a, 60a, 69a). Petitioners admit, "Respondent was confined because he was charged with a major misconduct. . . ." (Brief for Petitioners at 14).

Indeed, if the Writ of Certiorari was granted to examine administrative custody, outside the disciplinary context, the factual record in this case is such as to justify dismissing the Writ as improvidently granted. *Burrell v. McCray,* 426 U.S. 471 (1976). In this regard, the regulations governing pre-disciplinary hearing confinement mirror those in *Hughes v. Rowe,* discussed, *infra.*

In examining the Pennsylvania regulations involved with administrative segregation pending a disciplinary hearing, it should be noted that disciplinary segregation or confinement in restrictive custody is conditioned upon the finding of disciplinary violations, after a prior hearing. BC-ADM 801 ¶ III [37 Pa. Code §95.103]. This position is recognized by Petitioners (Brief for Petitioners at 23); (Pet. Cert. 10) and the Court of Appeals. *Helms,* 655 F.2d at 494 (Pet. Cert. 13a).

However, pre-disciplinary administrative segregation is also limited to specific events or conditions. *Hughes v. Rowe,* 449 U.S. at 16-17 (White, J., *concur.*). Administrative Directive 004 allows for such segregation pending the arrival of State Police if "necessary to maintain security." (Pet. Cert. 4a). BC-ADM 801 ¶ IV.B.1. [37 Pa. Code §95.104(b)(1)] conditions pre-disciplinary confinement to an inmate charged with misconduct, wherethere is a "need for control" and limits confinement under this provision to "pending application of procedures under ¶ III [37 Pa. Code §95.103]". ¶ III.D.1. provides for a mis-

conduct hearing within six days of receipt of notice of the charges.[15] ¶ IV.B.3. of the Administrative Directive 801 [37 Pa. Code §95.104(b) (3)] conditions "temporary" administrative custody under investigation "where it has been determined there is a threat of a serious disturbance or a serious threat to the individual or others", and limits the investigative confinement to the event that it not exceed ten (10) days. It states, "[T]he inmate *must* be released in all cases within ten (10) days. [emphasis added]."[16]

The Court of Appeals recognized these criteria limited confinement in administrative custody. *Helms,* 655 F.2d at 496-497 (Pet. Cert. 16a-20a).

The creation of liberty interests on the part of the inmate, from these regulations and directives can also be gleaned from the preparatory language contained in Administrative Directive 801, ¶ II.A. [37 Pa. Code §95.102], which was issued by the then Attorney General and Commissioner of Correction. It provides in pertinent part, "Rules and regulations which define expectations and prohibitions and which apply throughout the Bureau [of Correction] shall be established in writing in the form of Administrative Directives issued jointly by the Attorney General and the Commissioner of Correction."

Furthermore, the entitlement under the State's regulations on administrative custody is not merely the result of the language contained in the regulation itself. The regulations contained in 37 Pa. Code §95.101 *et seq.* were issued as a result of a binding Consent Decree which the Pennsylvania

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[15]This limit of time creates a substantive expectation that the confinement will not exceed the period specified. *King v. Hilton,* 525 F.Supp. 1192, 1199 (D.N.J. 1981).

[16]*Id.*

Bureau of Correction voluntarily entered, as noted in the Pennsylvania Bulletin, when the regulations were published. 8 Pa. B.2682 (Sept. 30, 1978). The preamble to the regulations states, "The purpose of this order [promulgating the regulations] is to bring the Bureau of Correction's above-mentioned regulations [concerning disciplinary custody and restrictive housing] into compliance or into existence in compliance with the Consent Decree entered as modified by Order of Judge Joseph S. Lord, III, on May 22, 1978 in the case captioned *I.C.U. v. Shapp,* C.A. 70-3054 (E.D.Pa.)." *Id.*

In *Hughes v. Rowe,* this Court was concerned with Illinois regulations providing that an inmate could be placed in administrative segregation, under investigation, if "in the interest of institutional security and safety." 449 U.S. at 12 n.11. A prisoner could also be removed from the general prison population, pending a disciplinary hearing "on an emergency basis due to serious aggressive behavior and/or for safekeeping... which in no case may exceed 72 hours."[17] *Id.* at 17 n.2. Segregation, as here, could only be imposed after a hearing resulting in a finding of a rule violation. *Id.* at 16 n.1.

For purpose of stating a claim, this Court recognized in *Hughes* that "Segregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions." *Id.* at 5. Justice White in his concurrence agreed that procedural protections were re-

[17]In *Wolff v. McDonnell,* the regulations governing the use of segregation provided for pre-disciplinary hearing, administrative confinement, for various reasons including "To insure immediate control and supervision" and "To insure the safety and security of the institution." 418 U.S. at 552 n.8.

quired under *Wolff v. McDonnell,* but only because of the State created liberty interests arising from the Illinois regulations at issue. 449 U.S. at 16-17.

The regulations or directives in this case are strikingly similar to the ones analyzed in *Hughes* and for the reasons discussed, *supra,* should also be held to create due process procedural protections, regardless of the source of the entitlement.

The Petitioner prison officials claim there is nothing mandatory about these regulations and that they are committed to the discretion of prison officials (Brief for Petitioners at 14). Yet, under BC-ADM 801 ¶ IV.B.3. [37 Pa. Code §95.104(b) (3)], concerning administrative segregation pending investigation, "If no behavior violation has occurred, the inmate *must* be released as soon as the reason for the security concern has abated *but in all cases* within ten days" [emphasis added]. *Id.*

Despite the Petitioners' admission that Respondent was held in administrative custody pending investigation, which would appear to implicate BC-ADM ¶ IV.B.3. [37 Pa. Code §95.104(b) (3)] discussed *supra,* the District Court considered Mr. Helms' restrictive confinement under ¶ B1 [§95.104(b) (1)] and that this provision was silent as to the time limit of confinement under this subsection (Pet. Cert. 43a). The provision in ¶ B1 conditions the confinement on "the need for control pending application of procedures under paragraph III [§95.103] "Since under ¶ III.D.1. [§95.103(d) (1)] an inmate is to have a misconduct hearing within six (6) days of receipt of the notice of charges, confinement under this section is restricted as Helms received his notice of charges on December 4, 1978. (Answer ¶ 10 to Amended Complaint) (J.A. 37a-38a, 60a, 69a). His disciplinary hearing was not held until January 22, 1979. (J.A. 41a-46a).

Regardless of which directive or regulation applies and regardless of whether they are mandatory or a residuum of discretion is retained on the part of prison officials, the fact that they make the ultimate finding as to confining an individual does not preclude the creation of liberty interests. *Vitek v. Jones,* 445 U.S. at 90-491; *Greenholtz v. Nebraska Penal Inmates,* 422 U.S. 1, 9-10 (1979); *Helms,* 655 F.2d at 497 n.8 (Pet. Cert. 19a-20a, n.8).

In *Vitek,* the statute concerning transfers to a mental hospital did not mandate a transfer when the requisite findings were made, but said that the "director *may* arrange for his transfer [emphasis added]". 445 U.S. at 483 n.1.

Even Petitioners have recognized that whatever discretion they have in this situation, it is not boundless and is based on administrative criteria. (Pet. Cert. 10).

In Petitioners' Brief in the Court of Appeals they stated, "The defendants [Petitioners] do not argue that the Plaintiff [Respondent] or any other inmate may be segregated for whatever reason or for no reason at all" (Brief for Appellees at 13-14). Indeed, to do so in administrative custody might violate principles of substantive due process. *Bono v. Saxbe,* 620 F.2d 609, 616 (7th Cir. 1980).

Finally, in this regard, is the case of *Hoss v. Cuyler,* 452 F.Supp. 256 (E.D.Pa. 1978) wherein the Court examined the 1977 version of BC-ADM 801 in evaluating standards for release into the general prison population of a Pennsylvania state inmate who had been held in administrative segregation for over 5 years. Interestingly, ¶ IV.B.1. and 3. [§95.104(b)(1)(3)] as contained in the 1977 directive have virtually identical language as presently contained in the 1978 version applicable to this case. 452 F.Supp. at 264. In interpreting BC-ADM 801 in general, the *Hoss* decision held: "In my view, Administrative Directive No. 801, which . . . provides that BAU [segregated] confinement may be

imposed only in limited specific circumstances . . . establishes a liberty interest in freedom from segregated confinement and its harsh accompaniments under the law of Pennsylvania." *Id.* at 289-290. *Accord, United States, ex rel. Smith v. Robinson,* 495 F.Supp. 696, 702 (E.D.Pa. 1980) (citing *Hoss* and recognizing that 37 Pa. Code §95.107(c) requires release to the general prison population "as soon as appropriate", and creates a liberty interest in freedom from segregated confinement.)

Thus, in contrast to the statement of the Justice Department in their amicus brief, there is a presumption in Pennsylvania regulations in favor of an inmate's remaining in the general prison population. (Compare Brief for the United States at 20 with §95.107(c)).

III.

NO CIRCUMSTANCES EXISTED TO JUSTIFY THE ABSENCE OF REQUIRED DUE PROCESS PROCEDURAL GUARANTEES

A. THE LACK OF A PROLONGED EMERGENCY

Assuming this Court finds the directives and regulations create an expectation or entitlement protected by due process, there were no circumstances present in this case to justify the 51 day wait in administrative segregation, pending a disciplinary hearing.

Respondent recognizes that in an emergency situation due process procedural protections can be postponed a reasonable period of time or until the conclusion of the emergency situation. *Hughes v. Rowe,* 449 U.S. at 11; *Wright v.*

Enomoto, 462 F.Supp. at 405, *Helms,* 655 F.2d at 500 (Pet. Cert. 25a).

The Court of Appeals did not indicate, as asserted by the Department of Justice, that a hearing was required within 72 hours (Memorandum for the United States as Amicus Curiae) (Brief for the United States at 24 n.11). The Third Circuit stated:

> As to the 72-hour limit for a hearing, we do not consider the Supreme Court's summary affirmance [of *Wright*] to hold that any hearing held after 72 hours is constitutionally impermissible.
>
> . . . Thus, under the prevailing law of this Circuit, a prisoner transferred to solitary confinement is entitled to a hearing prior to his confinement or, if exigent circumstances exist, within a reasonable time thereafter.

655 F.2d at 499-500 (Pet. Cert. 24a, 26a).[18]

However, Respondent does not accept that the emergency justified the delay in providing a disciplinary hearing in this case. The record is clear that the disturbance ended on the night it began and that the institution returned to normal within a day or two. (J.A. 52a-59a, 68a). Exigent circumstances were not present. *Hughes v. Rowe.*

Wolff v. McDonnell recognized the need for "swift and sure" disciplinary action,[19] absent in this case. 418 U.S. at 563.

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[18]Two subsequent decisions to *Helms,* within the Third Circuit, have also interpreted the decision as not requiring a 72-hour rule. *King v. Hilton,* 525 F.Supp. at 1197; *Drayton v. Robinson,* 519 F.Supp. 545, 550 (M.D.Pa. 1981).

[19]The American Correctional Association (ACA) notes that it is essential "To ensure fairness and the integrity of the disciplinary process, inmates charged with rule violations should receive speedy hearings." ACA, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS at 94 (1981) (Standard 2-4359 providing for hearings within seven days of the alleged violation).

B. PENDING CRIMINAL PROSECUTION IS AN INTEREST FOR THE INMATE TO ASSERT IN DISPENSING WITH DISCIPLINARY PROCEDURES, NOT PRISON OFFICIALS

In *Wolff v. McDonnell,* this Court recognized that "Prison disciplinary hearings are not part of a criminal prosecution. . ." 418 U.S. at 556. The *Wolff* decision also recognized that different interests were at stake in comparing the criminal process to the prison disciplinary framework. *Id.* at 561-563. Thus, different procedures are appropriate. *Id.*

In *Baxter v. Palmigiano,* 425 U.S. 308 (1976), this Court held that counsel or use immunity were not required in a prison disciplinary proceeding where the inmate faced charges also punishable in state criminal proceedings because "Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime." *Id.* at 319.

If the inmate fears that the disciplinary process will incriminate him, he can remain silent at his disciplinary hearing, as happened in *Palmigiano. Id.* at 318. While Helms did not remain silent at his disciplinary proceeding[20] in this action, silence is insufficient by itself, to support a misconduct conviction in Pennsylvania. BC-ADM 801 ¶ III.E. [37 Pa. Code §95.103(e)]. This insufficiency of silence was also true under Rhode Island law in *Palmigiano,* 425 U.S. at 317. See, *Due Process in Prison Disciplinary Proceedings,* 22 B.C. L.REV. 1009, 1045 (1981).

Similarly, if the inmate wishes to forego a disciplinary

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[20](J.A. 45a-46a).

hearing or postpone it until after the criminal proceedings, he can sign a written waiver to this effect.[21] The point is that while a pending criminal proceeding may not justify additional procedural protections in prison disciplinary matters, by the same token, it does not justify taking away what protections already exist. *Baxter v. Palmigiano.*

C. NO OTHER CONSIDERATIONS JUSTIFIED THE DELAY

The criminal investigation did not justify the delay in this case, in part based on the reasons set forth in part III.B. *supra.* Administrative Directive .004 provides that "A hearing complying with BC-ADM 801 will be carried out after the investigative period. Such hearings shall be held within four (4) days unless the investigation warrants delay and in that case as soon as possible." BC-ADM .004 ¶ IV.B.1. (Pet. Cert. 4a).

In addition, at ¶ IV.C.4., Directive .004 [37 Pa. Code § 95.7(4)] provides in pertinent part, "Upon completion of the investigation, the State Police investigators shall informally report the findings of their investigation to the Superintendent, prior to the filing of any criminal complaint, ..."

In regard to the above quoted sections, Respondent's criminal investigation was completed by December 10, 1978 as he was criminally charged on December 11, 1978. (J.A. 60a, 69a). Pursuant to ¶ IV.C.4. of .004, Petitioner

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[21]This procedure is sanctioned by the ACA. ACA, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS at 93 (Standard 2-4356). In the Federal Bureau of Prisons, there are provisions for the inmate to waive, in writing, his right to be present at disciplinary and administrative custody hearings. 28 C.F.R. § § 541.15(d), 541.20(c).

Hewitt would have known of the completion of the investigation by December 10, 1978.

Yet, despite when the investigation was completed, a due process disciplinary hearing was not held[22] for Helms within four (4) days as set forth in .004. It cannot be argued that it was impractical to provide it sooner in light of when it was provided for other inmates and in considering the Institution had long since returned to normal. The District Court, despite its decision, found when the investigation ended as irrelevant. (Pet. Cert. 43a).

The only other relevant section of .004 which involves administrative segregation to "maintain security" is ¶ IV.B.1. and this provision is relevant only "Pending arrival of the State Police." (Pet. Cert. 4a). They arrived on December 3, 1978 at SCI Huntingdon. *Helms,* 655 F.2d at 490 (Pet. Cert. 3a).

Regardless of which Administrative Directives or regulations one chooses to say applied in this case, Petitioners chose not to follow any of them, even though they were in communication with and apparently had access to counsel. (Affidavit of Petitioner Kyler) (J.A. 83a). No valid excuses are present.

In addition, the consequences of administrative segregation for periods in excess of those permitted under the applicable regulations impairs the disability to present a defense to a disciplinary charge. *Vitek v. Jones,* 445 U.S. at 498 (Powell, J. *concur*).

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[22]A 1980 survey of disciplinary regulations in 40 states, the District of Columbia and the Federal Bureau of Prisons indicates that 29 jurisdictions limit the length of pre-hearing confinement by providing for a disciplinary hearing or a periodic review within a specified time limit. *Due Process in Prison Disciplinary Proceedings,* 22 B.C.L. REV. at 1014, 1034.

In his Affidavit, inmate Helms indicates he was confined in administrative segregation on B-Block in his cell, virtually 24 hours a day (J.A. 35a). "Perhaps the most significant event which occurs prior to the disciplinary hearing is the preparation of the inmate's defense". *Due Process in Prison Disciplinary Proceedings,* 22 B.C.L. REV. at 1037. Even if an inmate is not in pre-disciplinary segregation he has limited freedom of movement for preparing his defense. *Id.* at 1038-39.

Justice Powell in his concurrence in *Vitek v. Jones* noted "[T]he circumstances of being imprisoned without normal access to others who may assist him places an additional handicap upon an inmate's ability to represent himself." 445 U.S. at 498. Obviously, this handicap was exacerbated here.

IV.

INDEFINITE ADMINISTRATIVE CUSTODY OUTSIDE THE DISCIPLINARY CONTEXT

A. STATE CREATED LIBERTY INTERESTS

Assuming, *arguendo,* that the issue in this case is viewed as administrative custody outside of the disciplinary context, under the facts present the administrative custody was potentially indefinite. It has previously been discussed how the applicable time constraints in the administrative custody directives and regulations have not been followed and that appropriate due process did not accompany the abrogation of rights under the State provisions. Respondent was in limbo prior to January 22, 1979 as to when, if ever, he would be released into the general prison population or when the process he claimed was due, would be forthcoming. *Larkins v. Oswald,* 510 F.2d 583, 590 (2d Cir. 1975).

> Administrative custody is to be used as follows:
>
> The purpose of placing an inmate in this unit shall be to maintain the safety of the Institution by segregating an individual who poses a threat to other inmates, to staff or to himself, poses an escape risk or needs protection from other inmates. The decision to place an inmate in this custody must comply with III.G.4. [30 day status review of those already in administrative or disciplinary custody], IV.B.1., IV.B.3. [see discussion part II, *supra*.] or IV.B.4. [concerning requests for self-confinemement]. Determination of whether close or maximum administrative custody is necessary will be made by the Program Review Committee.

BC-ADM 801 ¶ VI.A.1. [37 Pa. Code §95.107(a) (1)].

The discussion in parts I and II, *supra,* is relevant here in terms of evaluating whether or not these constraints of administrative custody create liberty interests protected by due process. It is Respondent's position that the above quoted provision limits the adverse action [placement in administrative segregation] to events involving the safety of the Institution and for specified time periods, where a finding is made that the inmate fits within the definition of posing a threat to himself or others, is an escape risk or needs protection. *Wright v. Enomoto,* 462 F.Supp. at 403; *Hoss v. Cuyler,* 452 F.Supp. at 266, 289-290.

In *Wright v. Enomoto,* the regulation provided "§3330 General Policy (a) Inmates must be segregated from others when it is reasonably believed that they are a menace to themselves and others or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons". 462 F.Supp. at 403. The Court went on to hold, "Thus, the inmate has an interest, conferred by statewide regulation and protected by due process, in not being confined in maximum

security segregation unless he is found, for clearly documented reasons, to come within the standard set by the rules." *Id.*[23]

Other Courts evaluating similar administrative segregation regulations which limit confinement therein to specific safety or security factors, have reached a similar result in finding the creation of liberty interests. *Bartholomew v. Watson,* 655 F.2d 915, 917 (9th Cir. 1982), *aff'g in part, rev'g and remand. in part, Bartholomew v. Reed,* 447 F.Supp. 223, 231 (D.Or. 1979); *Parker v. Cook,* 642 F.2d 865, 872 (5th Cir. 1981); *Bills v. Henderson,* 631 F.2d 1287, 1292-93 (6th Cir. 1980); *Mitchell v. Hicks,* 614 F.2d 1016, 1017-18 (5th Cir. 1980) (stating a claim for State created liberty interests); *Rafone v. Robinson,* 607 F.2d 1058, 1060 (2d Cir. 1979); *Arsberry v. Sielaff,* 586 F.2d 37, 48 (7th Cir. 1978) (dictum); *Finney v. Mabry,* 528 F.Supp. 567, 570 (E.D.Ark. 1981); *Ruiz v. Estelle,* 503 F. Supp. 1265, 1365 (S.D.Tex. 1980),[24] *mod. on gds. pend. appeal,*

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[23]The summary disposition of *Wright* is a disposition on the merits. *Hicks v. Miranda,* 422 U.S. 332, 344 (1975), citing C. Wright, *Law of Federal Courts,* 495 (2d ed. 1970). Furthermore, "lower courts are bound by summary decisions by this Court [United States Supreme]" until such time as the Court informs [them] that [they] are not.' " *Hicks,* 422 U.S. at 344-345. An accurate description of summary affirmances is that they "obviously are of precedential value . . . [but], they are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman v. Jordan,* 415 U.S. 651, 671 (1974).

[24]It is interesting to note that the United States Department of Justice intervened on behalf of the Plaintiff in *Ruiz* and took the opposite position from what it takes in this case as to the creation of liberty interests and the necessity for procedural protections in the administrative custody situation. See, Department of Justice Post-Trial Memorandum, Vol. II at 415, 422-423 (advocating *Wolff* procedures in administrative segregation.) A Consent Decree filed April 20, 1981, in *Ruiz,* provided for the procedures in *Wolff* and *Wright v. Enomoto* to govern administrative segregation. See n.10, *supra.*

650 F.2d 555, 666 F.2d 85 (5th Cir. 1982); *Marioneaux v. Colorado State Pen.*, 465 F.Supp. 1245, 1248 (D.Col. 1979). *See also, Bono v. Saxbe*, 450 F.Supp. 934, 941 (E.D.Ill. 1978), *aff'd*, 620 F.2d 609, 616 (7th Cir. 1980). *But see, Daigle v. Hall*, 564 F.2d 884 (1st Cir. 1977).

In considering the preparatory language of the administrative directive here as to expectations and prohibitions, the Consent Decree in *I.C.U. v. Shapp* and the above precedents discussed in parts I and II, *supra*, and in this part, a State created liberty interest or entitlement arises regardless of the context in which the administrative segregation in the case at bar is viewed. *Vitek v. Jones*.

B. THE NATURE OF ADMINISTRATIVE SEGREGATION IN PENNSLYVANIA AND THE DUE PROCESS CLAUSE

The Respondent has detailed some of the conditions of administrative custody which are virtually identical to disciplinary segregation. Under any measure, it cannot be considered as approaching the freedom of the general population.[25] Yet, the inmate in disciplinary segregation at least knows it is for a definite term. BC-ADM 801 ¶ III.F.2c. [37 Pa. Code §95.103(f)(2)(iii)] (providing for a

[25]Petitioners and their amicus repeatedly cite 37 Pa. Code §95.107(a) (2) for the proposition that inmates in administrative segregation have all the rights and privileges of general population, except as they may be inconsistent with the status. However, in light of Helms' unrebutted Affidavit as to the conditions in administrative segregation, it might be more appropriate to add that with the exception of three meals and a cell, prison officials have determined that all rights and privileges of general population are inconsistent with administrative custody.

maximum of six months disciplinary custody). "The deprivation suffered by a prisoner confined for administrative reasons is greater than that suffered by one confined on a disciplinary charge . . . In contrast, administrative segregation is for an indefinite period — the prisoner may be confined for months, even years, without hope of release." *Wright v. Enomoto,* 462 F.Supp. at 403-404. This unknown of release, itself can create anxiety and anguish, *Larkins v. Oswald,* 510 F.2d at 590.

More importantly, prolonged administrative segregation can produce psychological damage even in the absence of physical brutality or unhygienic conditions. *Solitary Confinement as Psychological Punishment,* 13 CALIF. W. L. REV. 365, 268 (1977).[26] The article notes that the brain and nervous system cannot function normally without stimulation and renforcement from social intercourse, exercise, sports, and the freedom to move about. *Id.* at 269-275. These stimulations were also absent during Respondent's confinement. (J.A. 35a). The studies in the article indicate that more sensory stimulation and exercise help produce behavioral and emotional stability. *Id.* at 274. In *Wright,* the Court indicated that the lack of exercise, lack of recreational or rehabilitative programming, and absence of human interaction may cause permanent psychological and physical damage.[27] 462 F.Supp. at 399 n.4. *Accord, Hardwick v. Ault,* 447 F.Supp. 116, 125-126 (M.D.Ga. 1978).

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[26]The article treats solitary and segregation the same in terms of detrimental effects and recognizes the distinction as more of semantics than substance. 13 CALIF. W. L. REV. at 267 n.8, 280 n.61.

[27]The United States in *Ruiz v. Estelle* also recognized the lack of exercise and activities, sensory deprivation, and physical and psychological destruction of inmates held in prolonged administrative segregation. Department of Justice Post-Trial Memorandum, Vol. II at 381-383, 418, 421. Justice said that these conditions were the equivalent of disciplinary custody. *Id.* at 422.

One Federal Court recently noted the psychological harm after only thirty days of administrative segregation in a Federal facility, due to lack of human interaction and relationships. *Boudin v. Thomas,* 533 F.Supp. 786, 791, (S.D.N.Y. 1982). *Accord, Brown v. Neagle,* 486 F.Supp. 364, 367 (S.D.W.Va. 1979).

From the interest of prison officials, prolonged confinement also has dangerous consequences:

> On the emotional level, the effect of solitary is comparable to prison personnel teaching the prisoner how to use explosives, or how to sharpen his aim with a gun . . . It [the prison] is handing the prisoner a gun to use whenever he gets the opportunity, either in the prison population or later when released into society.

Id. at 277. *Accord, Hardwick v. Ault,* 447 F.Supp. at 126 n.8.

In *Pugh v. Locke,* 406 F.Supp. 318 (M.D.Ala. 1976), *aff'd & mod. on other grds; Newman v. State of Ala.* 559 F.2d 283 (5th Cir. 1977), *cert. grant. in part & remand.; Alabama v. Pugh,* 438 U.S. 781 (1978), the District Court stated:

> Inmates are denied any meaningful opportunity to participate in vocational, educational or work activities. As a result, most inmates must spend substantially all of their time crowded in dormitories in absolute idleness. Such unbroken inactivity increases boredom, tension and frustration, which in turn promote incidents of violence. The evidence reflects that idleness of this magnitude destroys any job skills and work habits inmates may have and contributes to their mental and physical degeneration.

406 F.Supp. at 326. *Accord, Spain v. procunier,* 408 F.Supp. 534, 544-545 (N.D.Cal. 1976), *aff'd as mod. on other grds.,* 600 F.2d 189 (9th Cir. 1979) (involving administrative segregation).

Thus, the purposes for which prison officials initially place someone in administrative segregation, may no longer be served in cases of prolonged confinement.

The potential for psychological damage in cases of prolonged administrative segregation, including damage from sensory deprivation, has been noted in Pennsylvania prisons as well. *Hoss v. Cuyler,* 452 F.Supp. at 272, 292; *Mims v. Shapp,* 457 F.Supp. 247, 250 (W.D.Pa. 1978).

In *Hoss,* in discussing the harsh conditions of administrative segregation, then known as the BAU, the District Court recognized that "BAU confinement is not part of the sentences imposed on him [inmate Hoss]", 452 F.Supp. at 285. No part of the sentencing code in Pennsylvania authorizes such confinement. 42 Pa. C.S.A. §9701 *et seq.*

The reason this confinement status is not in the sentencing code is because, historically, the Pennsylvania prison system has evolved from segregated or solitary confinement to one where an inmate is sentenced to the general prison population to communicate and live with others. H. E. BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA (1968) at 288-303; Pennsylvania Crime Commission, *Corrections in Pennsylvania-Task Force Report* (1969) at 7. The Crime Commission noted in this regard:

> A new school of thought emerged with the growth of western democracy in the late 18th and early 19th centuries. It maintained that man's actions are based on seeking pleasure and avoiding pain. It was reasoned that imprisonment would deter crime by making it more painful than pleasant to break the law. At the same time it would afford a place for the criminal to penitently contemplate his sins and work at a craft. During this era, Pennsylvania evolved a penal philosophy based on

> Quaker beliefs which espoused the individual isolation of prisoners to avoid harmful influences on others. Known as the Pennsylvania system, or separate system, this approach to corrections was symbolized by the Eastern State Penitentiary erected in 1829 at Cherry Hill in Philadelphia. Resembling a medieval fortress and containing an individual, walled-in exercise yard at the rear of each cell, the prison was deliberately adapted to the principle of "separate and solitary confinement at labor, with instrution in labor, in morals, and in religion." To further ensure isolation and anonymity, prisoners were enshrouded in hoods.
>
> The ancient structure in Philadelphia, now known as the State Correctional Institution at Philadelphia, is still in active use, although *the philosophy and practice of "separate and solitary confinement" have long since been abandoned.* Other buildings constructed in the 19th century and still in use are the State Correctional Institutions at Pittsburgh and Huntingdon and 55 of Pennsylvania's county jails. [emphasis added].

Id.

In an 1850 report of the Eastern State Penitentiary it was noted that critics of the separate and solitary system found deleterious mental effects on those so confined. *Report of the Inspectors of the Eastern Penitentiary* (1850) at 24-8. Similarly, in abolishing the "Pennsylvania (separate system" at the old Western Penitentiary it was stated, "Man is formed for society. He cannot well live without it. Ostracize him from the world and his fellow men and he soon loses his own self-respect, because he feels that he has forfeited that of others." *Annual Report of the Inspectors of Western Penitentiary* (1866) at 4-5. These same inspectors stated in 1871:

> We have just emerged from a chrysalis or transition stage in the management of this institution. The reach

> from a rigid solitary system of discipline to the more liberal and enlightened congregate idea, is a tedious and difficult one, especially where public opinion has been educated for a long series of years to the belief that the existing regime in infallible. . . .

Annual Report of the Inspectors of Western Penitentiary (1871) at 5-6.

In 1913, the General Assembly of Pennsylvania legally terminated the separate and solitary system which had gone out of existence years before. THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA at 302. The law of July 7, 1913 allowed the congregation of inmates "For the several purposes of worship, labor, learning and recreation." *Id.*; *Laws of the General Assembly,* 1913, at 708.

Thus, administrative custody under the deprivations present in this litigation is not contemplated, as within the normal range of a Pennsylvania sentence. *Id.*; *Vitek v. Jones,* 445 U.S. at 493; *Meachum v. Fano,* 427 U.S. at 225.

The National Association of Attorneys General has stated in this regard:

> Such procedures [due process] may be mandated because the court believes that such confinement [administrative segregation] is indistinguishable from punishment which cannot be imposed without due process, a conclusion based either on the court's assessment of the dominant purpose of the transfer or on the view that the *deprivation involved is so severe that such custody is not within the contemplation of the original sentence but lies outside "the normal ranges or limits of custody."* [emphasis added].

The National Association of Attorneys General Committee on the Office of Attorney General, *Administrative Segregation of Prisoners: Due Process Issues,* (Jan. 1979) at 29. Such considerations apply in the case at bar.

In *McAlister v. Robinson,* 488 F.Supp. 545 (D.Conn. 1978), *aff'd, Rafone v. Robinson,* four inmates were placed in indefinite administrative segregation under investigation for suspicion of involvement in a killing of another inmate and because of fear of racial polorization. Similar to the instant case, there was insufficient evidence of the involvement of the *McAlister* inmate Plaintiffs in the homicide, and insufficient evidence of racial polorization, and they were ordered released into the general prison population. 488 F.Supp. at 550-551, 557-559. As to the nature of administrative segregation, the District Court in *McAlister* held:

> While a convicted criminal in Connecticut may among other alternatives be sentenced to any prison in the state, it is not within the sentencing judge's discretion to assign that criminal to administrative segregation within a particular prison. Conn. Gen. Stat. § § 54-77 *et seq.* Prisoners are incarcerated in the general population of prisons unless the prison administrators assign them to a higher security status . . . Placement of a prisoner in administrative segregation involves a deprivation of "liberty" which is once removed from and certainly far more restrictive than, any possible original sentence ordered by a judge in Connecticut.

Id. at 554. *Accord, Polizzi v. Sigler,* 564 F.2d 792, 797 (8th Cir. 1977); *Hardwick v. Ault,* 447 F.Supp. at 125 (recognizing the segregation unit's lack of exercise, lack of human contact and mental deterioration "constitutes punishment beyond the original, ordinary incarceration of inmates in the Georgia prison system").

The nature of administrative segregation in Pennsylvania is also far removed from and far more restrictive than any possible original sentence ordered by a Judge in Pennsyl-

vania.[28] *McAlister v. Robinson.* The protections of the Due Process Clause of the Constitution are warranted. *Vitek v. Jones,* 445 U.S. at 493-494.

V.

THE PROCESS DUE

A. THE INTERESTS INVOLVED AND THE NATURE OF THE DECISION MAKING

It should be clear at the outset that this Court is not faced with a challenge to the right to use administrative custody or that procedural due process preempts the use of this status. Similarly, Respondent does not claim that procedures are required in emergency circumstances, nor does he seek to prevent prison officials from deciding whom should be placed in this custody, as Petitioners and their amicus claim throughout their Briefs. Furthermore, this case does not involve the question of whether an inmate has been sufficiently rehabilitated for parole. *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. at 10.

Assuming the creation of liberty interests that are protected by due process, the question becomes what process is

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[28]Under a Due Process Clause analysis, this case cannot be compared to *Greenholtz v. Nebraska Penal Inmates.* Respondent is not seeking to obtain parole, home furloughs, or some minimum security status which he did not have. 442 U.S. at 9. He seeks to retain the range of his sentence, the normal day to day status of a general population inmate, which he had prior to December 3, 1978, and the accompanying freedom of movement. See *Youngberg v. Romeo,* ____ U.S. ____, 50 U.S. L.W. 4681, 4683 (June 18, 1982).

due, to prevent the arbitrary abrogation of these rights. *Wolff v. McDonnell,* 418 U.S. at 557. An answer to this question depends on a balancing of the private interest affected, the risk of error in the State's existing procedures, and the governmental interest in the use of the challenged procedures. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976); *Wolff,* 418 U.S. at 567.

Unlike disciplinary custody which arises out of a fixed or single event, the nature of administrative segregation is such that "the reason or reasons for the segregation must not only be valid at the outset but must continue to subsist during the period of the segregation." *Hoss v. Cuyler,* 452 F.Supp. at 291; *Mims v. Shapp,* 457 F.Supp. at 247; *Solitary Confinement as Psychological Punishment,* 13 CALIF. W. L. REV. at 295. If a restrospective look at the period of administrative segregation is not made, then it could never be determined that the inmate's conduct or circumstances justified release or continued confinement. *McAlister v. Robinson,* 488 F.Supp. at 556-557.

Petitioners implicitly concede that arbitrary decision making is not in their interest or in the interest of the inmate who faces administrative segregation. (Brief for Petitioners at 16-17). However, they claim that the decision making on the part of prison officials, in this context, is not subject to objective evaluation. (*Id.* at 14).

In *Pugh v. Locke,* a general conditions and prison overcrowding case, the Court found that there was no rational classification system functioning in Alabama prisons. 406 F.Supp. at 324. This absence of a rational system helped lead to rampant violence. *Id.* In attempting to evaluate and correct the problem in *Pugh v. Locke,* experts in correctional practices had as their goal "The conversion of *subjective impressions into objective decisions* [as] a major task in the

implementation process, . . . [emphasis added]." *Psychology at the Interface of Law and Corrections: The Alabama Correctional Psychology Experience,* 3 L. & PSYCH. REV. 1, 8 (1977).

In a similar lawsuit in Rhode Island, the failure of the classification system and the concomitant violence was due to the lack of adequate data to form a part of the decision making process and because many of the classification decisions were based on "gut-feeling." *Palmigiano v. Garrahy,* 443 F.Supp. 956, 967 (D.R.I. 1977).

The Federal Bureau of Prisons (BOP) in attempting to establish a classification system for making security level determinations for incoming inmates, has also sought to turn subjective judgments into objective decisions. *Inmate Classification: Security/Custody Considerations,* 43 FED. PROB. 37 (1979). The problem as viewed by the task force in evaluating the Federal system was "that while there was consistency at the conceptual level [as to factors to utilize in classifying], in actual practice this seemed to become lost. A procedure was needed which would insure the systematic assessment of every new commitment on all pertinent variables". *Id.* at 38.

The task force identified six primary variables in which information was to be gathered, with points to be assigned for each variable. It went on to provide that "The total number of points a newly committed inmate receives identifies a subset of BOP institutions which have the security features appropriate for that individual." *Id.* at 40. This systematic process also applies to assigning living units within a facility based on security corners. See, *Unit Management in a Penitentiary: A Practical Experience,* 42 FED. PROB. 40 (1978). Yet, in attempting to insure consistency and a systematic approach, subjective professional impressions were not disregarded. *Inmate Classification,* 43 FED. PROB. at 42.

Just because subjective impressions or predictions are involved, does not mean that the decisions in this case are not subject to objective analysis, based on facts gathered or that the choice facing this Court is due process versus the discretion of prison officials. *Vitek v. Jones,* 445 U.S. at 495.

The psychiatric diagnosis in *Vitek* was also not subject to certainties, and psychiatric diagnosis "is to a large extent based on 'medical impressions' drawn from the subjective analysis and filtered through the experience of the diagnostician." *Addington v. Texas,* 441 U.S. 418, 430 (1979). Petitioners and their amicus claim the same type of decision making process, in terms of subjective impressions is involved here (Brief for Petitioners at 14); (Brief for the United States at 8). The *Vitek* Court stated in this regard:

> The question whether an individual is mentally ill and cannot be treated in prison "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists". *Addington v. Texas,* 441 U.S. at 429. The medical nature of the inquiry, however, does not justify dispensing with due process requirements. It is precisely "[t]he subtleties and nuances of psychiatric diagnoses" that justify the requirement of adversary hearings. *Id.* at 430.

445 U.S. at 495. The subtleties or nuances that may be involved in a security decision to transfer into or release from administrative segregation also turn on the meaning of facts and does not justify dispensing with due process requirements. *Id.*[29]

[29]Regulations of the Federal Bureau of Prisons also appear to provide for a retrospective analysis based on objective facts in the administrative custody situation. Their status reviews after 30 days provide, "The assessment [of the inmate] submitted [by staff] to the reviewing authority in a written report, should address the inmate's adjustment to his surroundings and the threat the inmate poses to self, staff, and other inmates." 28 C.F.R. §541.20(c). If this confinement continues over 30 days, psychiatric or psychological assessments are also made.*Id.*

If these prison officials, in the absence of exigent circumstances, are making administrative custody decisions without gathering sufficient facts or data and without objectively evaluating them based on criteria or a systematic approach, their subjective predictions or "gut-feelings" may be synonymous with arbitrary or random determinations. *Greenholtz v. Nebraska Penal Inmates,* 422 U.S. at 20 (Powell, J., *concur in part dissent in part*).

B. THE RISK OF ERROR

No due process procedures are presently invoked prior to an inmate entering administrative segregation or within a reasonable time thereafter, in exigent circumstances. Only status reviews of this custody are presently employed (Brief for Petitioners at 22).

The weekly status reviews do not allow for the presence of the inmate and as previously indicated in the Statement of the Case, there is no evidence they were conducted in this case. As to 30 day reviews by the PRC, there is no opportunity for an inmate to present evidence or witnesses in his behalf, nor is this review accompanied by the procedures applicable to a disciplinary hearing. See n.6, *supra*.

Like the psychiatric decision of mental illness, experts have stated:

> The prediction of behavior dangerous to the safety and lives of others is a matter of considerable current controversy but most behavior science experts involved in this particular area agree that it is not possible to predict with any certainty whether or not a given individual will behave in such a manner.

Hoss v. Cuyler, 452 F.Supp. at 276. *Accord, Bono v. Saxbe,* 450 F.Supp. at 940. Thus, predictions of violent behavior

have a high risk of error. *Psychology at the Interface of Law and Corrections: The Alabama Correctionsl Psychology Experience,* 3 L & PSYCH. REV. at 8.

In *Vitek v. Jones,* this Court recognized that the District Court in that case had found the risk of error substantial enough to warrant appropriate procedures to reduce it. 449 U.S. at 495. The District Court in *Vitek* said, "[T]he risk of an erroneous deprivation of these private interests, is relatively high where the only safeguard used is the opinion of one physician or psychologist without opportunity for anyone - the prisoner or anyone on his behalf - to question that opinion."

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In *Wright v. Enomoto,* the inmate was brought before a classification committee, like the PRC here, after he had been placed in administrative segregation. 462 F.Supp. at 400. While given a chance to make a statement as in the instant case, the *Wright* plaintiffs had no opportunity to present evidence or witnesses in their behalf. *Id.* at 401. In ordering the procedures set forth in *Wolff v. McDonnell,*[30] for administrative custody, the *Wright* Court proclaimed:

> Defendants have made no showing that prison administration or safety will be jeopardized if defendants

[30]See n. 10 *supra.*

> are required to accord plaintiffs at least the minimal protections called for by *Wolff* in the case of disciplinary sanctions. These minimal protections are essential if the inmate is to have any chance whatever to prove that he does not represent a risk to the security of the institution and thereby to avoid subjection to the severe deprivations of confinement in maximum security. Indeed, defendants' interest in preventing prison violence may well be served by making fair procedures requisite to maximum security confinement.

Id. at 403. The same considerations apply here.

In *Withers v. Levine,* 615 F.2d 158 (4th Cir. 1980), a prison classification team reviewed the inmate record of only the plaintiff, but not his cell partner before assigning them to house together. *Id.* at 160. Plaintiff Withers had a history of being sexually assaulted, and his cell mate had a history of violent sexual assaults. *Id.* The *Withers* Court went on to state "Adequate procedures . . . could have insured that the cell assignment official was better informed so that he could have acted without complete indifference to the problem of safety." *Id.* at 162.

The point is that procedures other than simply reviewing a file can help with the gathering of information so that decisions will be based on as many facts as possible and reduce the risk of error. Furthermore, as indicated in Part IV.B., *supra,* erroneous decisions may invalidate the original interests sought to be served by placing someone in administrative custody, who will come out more resentful or violent than when he went into this restricted status.

Another parameter of the risk of error is the potential for the abuse in terms of either vague unsubstantiated assertions as to why someone should be segregated or that the administrative confinement is a label to escape procedures for what is essentially disciplinary or punitive action. *Wright*

v. Enomoto, 462 F.Supp. at 400-401, 404; *Parker v. Cook,* 642 F.2d at 875 (inmate held in administrative segregation for six weeks under investigation for suspected complicity in a scheme to sell favors and then released to general population without a hearing on the charges); *Ruiz v. Estelle,*[31] 503 F.Supp. at 1364 n.194 (inmates held for prolonged periods of administrative confinement for no identifiable reason); *Boudin v. Thomas* (reviewing regulations governing administrative segregation by the Federal Bureau of Prisons and recognizing the punitive nature of the confinement and lack of evidence to justify it in the case); *Hardwick v. Ault,* 447 F.Supp. at 122, 126-127 (inmates transferred into segregation for disciplinary reasons, without hearings and often kept there for inordinate lengths of time, even though they are not dangerous). See *Littlefield v. Deland,* 641 F.2d 729, 731 (10th Cir. 1981); *Due Process in Prison Disciplinary Proceedings,* 22 B.C.L. REV. at 1093.

In *Wright,* it was noted that inmates were confined for weeks or months because of vague assertions that they were suspected of involvement in activities, "spent too much time in the yard", or were simply a "threat", 462 F.Supp. at 400-401.

In *Hoss v. Cuyler,* while finding the prolonged confinement justified, criticized the PRC status reviews as often being *pro forma* and having a standard conclusion that Hoss was a "security case", without a sufficient explanation of why. 462 F.Supp. at 278, 300.

Similarly, in *Mims v. Shapp,* the Court criticized Pennsylvania officials, in that after five (5) years of administrative

[31]The Department of Justice aruged in *Ruiz* that administrative segregation was being used to circumvent procedural due process. Department of Justice Post-Trial Memorandum, Vol. II at 422.

segregation, no evidence of present dangerousness of the inmate in question had been adduced. 457 F.Supp. at 251. The PRC status reviews alleged as sufficient here, were also present in *Mims. Id.* at 249.

In *Hardwick v. Ault,* a status review committee for those in administrative segregation was found to be the epitome of arbitrary action and there was no indication that prison officials objectively tried to determine who was dangerous. 447 F.Supp. at 124-125, 127.

The nature of the conditions Respondent was subjected to have already been detailed, along with the finding that they were equivalent to disciplinary custody, but potentially indefinite in duration. As to support for the alleged involvement of Respondent, in the event that triggered his segregation, the record only reveals "insufficient information" of such. (J.A. 14a, 40a).

Appropriate procedures other than PRC status reviews are necessary to guard against the arbitrary abrogation of rights in this case.[32] *Wolff v. McDonnell,* 418 U.S. at 557. Indeed, *Wolff* noted "[I]t would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue." *Id.* at 571 n.19. Cf. *Cox v. Cook,* 420 U.S. 734 (1975), *per curiam* (discussing retroactivity of *Wolff* to solitary confinement cases, thus implicitly recognizing *Wolff* is not limited to good time situations).

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[32]The United States in *Ruiz v. Estelle,* argued for the necessity of objective criteria to govern administrative segregation because "[T]he types of conduct which may result in an inmate's placement in administrative segregation are a hodge podge which defy rational analysis" Department of Justice Post-Trial Memorandum, Vol. II at 418, 423.

C. THE PROCEDURES TO BE IMPLEMENTED AND THE GOVERNMENT AND PRIVATE INTERESTS

The private interest in avoiding indefinite administrative segregation and its harsh consequences have been detailed in Parts III.C. and IV.B., *supra,* as well as in the Statement of the Case. This interest will not be discussed further, except, as the procedures requested impact on the interest of the inmate. The procedures that should be implemented as a constitutional minimum, are taken largely from recommendations by the American Correctional Association (ACA) as a result of a grant awarded it by the National Institute of Corrections, Bureau of Prisons, United States Department of Justice. Correctional Law Project, ACA, *Model Correctional Rules and Regulations - Administrative Segregation,* (Rev. ed. Oct. 1979).

While Respondent is well aware that correctional standards or models do not necessarily equal constitutional minimums, the procedures mandated here largely mirror the procedures set forth in *Wolff v. McDonnell* and are not beyond what has been required by Courts considering the issue. See, *Wright v. Enomoto,* 462 F.Supp. at 404-405; *Bono v. Saxbe,* 620 F.2d at 618-19.[33] Furthermore, what Respondent is requesting be mandated has not compromised the ability of States who have tried these procedures, to make appropriate use of administrative segregation. *Model Correctional Rules and Regulations - Administrative Segregation* at 7.

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[33]Providing for disclosure of evidence against the prisoner and an opportunity to cross-examine witnesses against him, in the absence of good cause for doing so, in addition to the procedures of *Wolff v. McDonnell.* See n.10, *supra.*

The procedures necessary are, in the absence of exigent circumstances, and then within a reasonable time thereafter:

> 1. A hearing prior to being placed in administrative segregation which is preceded by at least 24 hours written notice detailing the time, date, and place of the hearing and rights which the inmate has at any hearing concerning his placement in administrative segregation, as well as a statement of reasons why he is being considered for administrative segregation;
>
> 2. At the hearing the inmate may present documentary evidence, witnesses, and shall have an opportunity to present his case, as well as ask questions of those participating in the hearing, except upon a finding, not arbitrarily made that to do so would be unduly hazardous to institutional safety or correctional goals;
>
> 3. An independent decisionmaker, who has authority to compel attendance of witnesses;
>
> 4. A written statement by the fact-finder as to the evidence relied on and the reasons for the action taken;
>
> 5. Qualified assistance;
>
> 6. A thirty day review of the administrative segregation, at which the original reason for segregating the individual would be considered in light of his adjustment and behavior while in segregation and at which the inmate would have the same rights as at the initial administrative hearing.[34]

The ACA suggestions note that the notice should be as specific as possible:

> It should avoid conclusory statements such as stating a segregating meeting [hearing] is to be conducted because an inmate is believed "to be a risk to the

[34]The ACA also provided for an appeal of the initial determination to the Superintendent and higher authorities which could result in a reversal of the initial decision on behalf of the inmate or institution. *Model Correctional Rules and Regulations - Administrative Segregation at 3.*

> security and order of the institution." Such statements are not only of no benefit to the inmate in attempting to prepare a presentation for the committee, but are also of no benefit to anyone attempting to conduct a meaningful revie v of the proceedings. The notice should tell the inmate why the institution thinks him a security risk . . . "because of the 3 assaults you have been found to have committeed" . . . "because of the loan sharking operation you have been running," etc.

Id.

Competent assistance is necessary not just because of illiteracy and the complexity of issues. *Id.*; *Wolff v. McDonnell,* 418 U.S. at 570. Assistance is also necessary because of the likelihood of pre-hearing confinement and its concomitant effect on the ability to gather information and present a case. *Helms,* 655 F.2d at 499 n.11 (Pet. Cert. 26a n.11); *Model Correctional Rules* at 7. See, Part III.C., *supra.*

As the purpose of the hearing is to base a decision on as much information as possible, to reduce the risk of error, the provisions are made for the decision maker to compel attendance of witnesses and for the questioning of those who participate in the proceedings. *Model Correctional Rules* at 7-9. See Part IV.A.B., *supra.*

As to infringing on correctional administration, it should be recognized that the decision maker need not come from outside the correctional setting. *Wolff,* 418 U.S. at 570-571. In addition, Pennsylvania prisons already provide, in the disciplinary context, for the HC or fact finder to compel attendance of witnesses if necessary and allow for inmate questioning of those participating in the hearing. BC-ADM 801 ¶ III.E.1., 5. [37 Pa. Code §95.103(e) (1) (5)].

In *Wolff,* in ordering a written statement of the evidence relied on and reasons for the action taken, this Court

recognized the written statement "protect[ed] the inmate against collateral consequences[35] based on a misunderstanding of the nature of the original proceeding" and that it helped the inmate propound his cause and guard against arbitrary action. 418 U.S. at 565.

Yet, even greater reasons for a specific written statement detailing reasons and evidence is required here. As the reasons for administrative segregation must be valid, not only at the outset, but as long as this custody status continues, it is important for sound correctional management to have a record which allows for intelligent decisions to be made concerning the inmate in the future and to allow persons not present at the hearing to review the decision and record in a meaningful way. *Model Correctional Rules* at 10.

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[35]Petitioners and their Amicus Curiae argue there are no parole or collateral consequences of administrative custody. (Brief for Petitioners at 16 n.12); (Brief for the United States at 11 n.3). Yet, they admit this status may result in a postponement of a parole hearing or a delay in release on parole (*Id.*) This collateral consequence of effecting parole was also present in the administrative segregation in *Wright v. Enomoto,* 462 F.Supp. at 399. Parole statutes in Pennsylvania require prison authorities to report and the Parole Board to investigate the conduct and behavior of prisoners, while incarcerated. 61 P.S. § § 331.19, 331.20. In addition, the Parole Board considers program involvement and the effect of rehabilitative services while incarcerated. Pennsylvania Board of Probation and Parole, *Information on Board Policies and Services for the Convenience of the Courts,* (Rev. June, 1978) at 2.

The most that can be said in this case is that it is unclear why Respondent was not released on parole at his minimum release date, since he alleged his administrative segregation would affect him adversely (J.A. 62a, 81a). What can be said, under the above statutes and policies, is that the Parole Board would have been informed of Respondent's administrative confinement and his being suspected of involvement in the disturbance and they would have noted and considered his lack of program involvement even though caused by this custody status.

> As to a specific written statment and its reasons:
>
> Conclusory "reasons" such as "the inmate was found to be a danger to others," standing alone are insufficient. The "reasons" must show what conclusion was reached and why (". . . due to his record of assaults on other inmates and several threatening statements made to staff . . ."). In a sense, a good "reasons" statement becomes like a good newspaper story in that it tells the "who, what, where, why, when, and how" of the committee's decision. The decision probably cannot and should not be written up in one or two sentences unless the facts of a given case are very simple and straightforward.

Id.

The 30 day review procedure, providing for inmate rights similar to the initial proceeding, but limited to facts occurring within the prior 30 day period, as reflecting on the original reasons for administrative segregation, strikes a balance between the flowing nature of or need for continuing validity of this custody status and the State's desire not to be saddled with repetitious procedures simply rehashing old information. *Id.* at 3, 11. As Pennsylvania and most jurisdictions already have some administrative segregation hearing or status review procedures,[36] this 30 day review does not require a complete new framework or tribunal be established.

As to Respondent, the Petitioners should have been required to hold a hearing preceded by notice and including the procedures set forth above, where they would have had to determine if the facts justified Mr. Helms' continuing in administative custody, under the conditions set forth in their regulations, since there was insufficient evidence of his involvement in the disturbance.

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[36]See, n. 22, *supra.*

As many of the procedures discussed, *supra,* and their framework are already in existence in Pennsylvania and since Petitioners claim to have voluntarily provided Respondent the administrative segregation hearing he seeks[37] prior to their status reviews, any burden is reduced. In addition, Petitioners conducted 215 *Wolff* [misconduct] hearings between December 3, 1978 and January 23, 1979 and have not claimed this impaired their ability to operate the Institution or return it to normal following the disturbance. As the disturbance allegedly involved 18 inmates, all of whom were confined immediately in administrative custody in the restrictive housing unit on B-Block ofSCI Huntingdon,[38] it cannot be argued that the hearing procedures sought would have substantially impacted on the work of institutional tribunals or related staff.

In summary, a balancing of all the interest affected, justifies the procedures requested by Respondent.

CONCLUSION

WHEREFORE, Respondent prays the judgment of the Court of Appeals be affirmed, as modified in this Brief.

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[37]The remand ordered by the Court of Appeals was to inquire whether a hearing and procedures similar to that set forth in *Wolff v. McDonnell* was provided Respondent on December 8, 1978. *Helms,* 655, F.2d at 500-501 (Pet. Cert. 28a).

[38](J.A. 52a).

Appendix A

BC-ADM 801
Administrative Directive
(Rev. 10-78)

Subject:
Institutional Disciplinary and Restricted Housing Procedure

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF JUSTICE

BUREAU OF CORRECTION

I. SCOPE AND PURPOSE

Institutional life shall be governed by standards of behavior designed to promote correctional objectives and to maintain the general welfare of the institutional community. The laws of this Commonwealth and the rules and regulations of the Bureau of Correction and of the institution are a part of the standards of behavior governing each institution.

Behavior which deviates from such standards shall be handled by staff in the manner prescribed by this directive. Such behavior shall be evaluated within the context of the total treatment plan of the individuals, the effect of such behavior upon others and its consequences for the good order of the entire institution.

The methods used by staff shall be for the purpose of bringing about voluntary compliance with the standards prescribed. Sanctions shall be imposed only when necessary and in the degree necessary to regulate the unacceptable behavior.

II. STANDARDS OF BEHAVIOR

A. Rules and regulations which define expectations and prohibitions and which apply throughout the Bureau shall be established in writing in the form of Administrative Directives issued jointly by the Attorney General and the Commissioner of Correction. Rules and regulations pertinent to each institution which comport with the Administrative Directives shall be established in writing by the respective Superintendents upon approval of the Commissioner of Corre tendents upon approval of the Commissioner of Correction. The above rules and regulations shall be as relevant to the norms of the general society as the special problems of group life in the institution shall permit. They shall be published by the distribution of individual copies to each staff member and to each inmate and posted on bulletin boards. They shall be fully explained in inmate orientation sessions, staff meetings and other training.

B. Behavior which constitutes any of the following misconducts shall be deemed a violation of rules and regulations in all state correctional facilities.

Such misconduct, classified as Class 1 or Class 2 in accordance with the following list, shall subject the inmate to the procedures of this directive.

(a) **Class 1 Misconducts**

1. Murder - Manslaughter
2. Escape
3. Possession of or Introduction of Contraband or Implements of Escape

4. Carrying a Deadly Weapon
5. Arson
6. Robbery
7. Burglary
8. Theft
9. Tampering with, Destroying or Damaging Property
10. Sodomy
11. Indecent Exposure
12. Rioting or Inciting to Riot
13. Conspiracy to Escape, Riot or Disrupt Normal Institution Routine that Could Result in Bodily Injury to Personnel or Inmates
14. Bribery of an Employee
15. Threatening an Employee or Inmate with Bodily Harm or Injury
16. Assaults and Fighting
17. Adulteration of any Food or Drink
18. Refusing to Obey an Order
19. Possession of or Use of Dangerous or Controlled Substances
20. Refusing to Work
21. Violating a Condition of Pre-release Program
22. Breaking Restriction or Quarantine
23. Intoxication
24. Making Fermented Beverages or Possession of Materials to Manufacture Fermented Beverages
25. Lying to an Employee
26. Conducting a Gambling Operation
27. Unauthorized Use of Mail or Telephone
28. Conduct with a Visitor in Violation of Posted Regulations
29. Presence in an Unauthorized Area

30. Loaning any Property for Profit
31. Isolence or Disrespect toward a Staff Member
32. Possession of Stolen Property
33. Violations of Administrative Directives not Specifically Enumerated
34. Other Felonies and Misdemeanors not Specifically Enumerated
35. Repeated Violations of Class 2 Misconducts

(b) **Class 2 Misconducts**

1. Body Punching, Horseplay
2. Taking Unauthorized Food from Dining Room, Kitchen or Officer's Mess
3. Possession of Unauthorized Clothing
4. Tattooing and other Forms of Self-Mutilation
5. Failure to Report to Work or Unexcused Absence from Work
6. Loaning or Borrowing Property except Legal Material
7. Failure to Follow Safety and Sanitation Regulations Regarding his Person, Quarters and Equipment
8. Failure to Stand Count or Interference with Count
9. Smoking where Prohibited
10. Any Violation of Rule or Regulation Contained in the Inmate Handbook not Specifically Enumerated Above

C. Attempts to commit any of the foregoing misconducts where the intent to do the prescribed act is clear and the inmate has taken substantial steps toward its completion, may be charged under the applicable misconduct.

III. PROCEDURES

A. Behavior problems which may be resolved by immediate counseling, warning or verbal reprimand shall be dealt with accordingly by the staff person involved. More serious violations shall be the subject of a Misconduct Report.

B. The Misconduct Report, a four-sheet snap set, shall in each case be distributed as follows: one copy shall be given directly to the inmate, whenever possible, by the staff member who wrote the Misconduct Report after approval by the ranking correctional Officer on duty that the Misconduct Report has been properly written. No action shall be taken on the Misconduct Report unless this is done. The inmate will receive the copy as soon as possible and if placed in pre-hearing confinement, no later than three hours after such confinement begins. One copy shall be retained by the staff person who wrote the misconduct. A third copy shall be forwarded to the Deputy Superintendent for Treatment Services. The original shall be forwarded to the Chairman of the Hearing Committee and, following disposition, will be retained in the JBC-15 (records jacket).

C. Misconducts shall be referred to the Hearing Committee which shall be composed of the Chairman, who shall be the permanent member (Major or Captain of the Guard), a Casework Supervisor and a School or Vocational Supervisor, both of whom may rotate periodically. In the absence or lack of any of the foregoing members, the Superintendent shall designate an appropriate substitute. The Hearing Committee shall not include any participants in the incident or incidents from which the charges arise.

D. The procedure for handling misconducts shall be as follows:

1. The inmate shall be informed in writing of the charge and given a specific date for a hearing which shall be held not less than 24 hours after receipt of this notice but within six days.

2. The inmate shall be permitted assistance in presenting his case from either any staff member or any inmate in general population status, provided that such staff member or inmate is willing to service in such an advisory capacity.

3. The inmate shall be permitted to meet with the person he chooses an appropriate length of time before the hearing.

4. The inmate shall be permitted to call witnesses at the hearing. They shall be regulated by the Chairman of the Hearing Committee based on their relevance to the case. No inmate can be forced to be a witness against his will.

E. The Hearing Committee shall conduct the hearing as follows:

1. The charge and alleged facts in support of the charge shall be read and fully explained by the Chairman. The staff member writing the misconduct may be present if he wishes and may call witnesses to support his claim. However, in cases of factual conflict, when the Hearing Committee deems it necessary to resolve the dispute, they shall compel the staff

member's presence and may continue the hearing until he can be present.

2. The inmate shal be permitted to admit or deny the charges and to give his version which shall be recorded on the misconduct form by a member of the Hearing Committee.

3. The inmate may present information available to him and to others, with help from whomever he has chosen to assist him.

4. The committee members may interrogate the person making the report, the inmate and others as necessary.

5. The inmate may question the staff member charging him if the staff member is present and other witnesses who testified against him. The extent of the questioning shall be controlled by the Chairman of the Hearing Committee as considerations of relevancy, security and other valid consideations dictate.

6. A written summary of the hearing will be prepared which will include the facts relied upon by the Hearing Committee to reach its decision and the reasons for the decision. A copy of the written summary will be given to the inmate. The inmate may if he wishes submit a concise summary of the hearing which summary shall be made a permanent part of the file.

7. After the decision is reached by the Committee, the inmate charged shall be called before the Committee to hear the decision and to be advised of its rationale.

8. A committee decision shall be based upon a preponderance of the evidence. Before action other than dismissal of the charges is taken, the Committee must be satisfied that, more likely than not, the inmate has committed a misconduct.

9. The inmate shall be informed that the decision of the Hearing Committee will be formally reviewed by the Program Review Committee upon the inmate's request. The inmate shall indicate on the Misconduct Report that he has been advised of his right to request a formal review and so attest by his signature; if the inmate refuses to sign two witnesses shall sign to attest that the inmate was advised of his right to request a formal review. The inmate shall be advised that he has fifteen days to submit a written request for a formal review.

F. The Hearing Committee may take the following actions:

1. In cases where the violation is proved and constitutes a Class 2 Misconduct:

a. Reprimand or recommend counseling.

b. Suspend privileges for up to fifteen days.

c. Assess fair repayment for property willfully destroyed.

d. Change cell assignment; excluding placement in Administrative Custody or Disciplinary Custody.

e. Submit a recommendation for transfer to another institution to the Program Review Committee.

2. In cases where the violation is proved and constitutes a Class 1 Misconduct:

a. Reduce classification to Class 2 Misconduct and take any action permitted above.

b. Take any action permitted for Class 2 Misconducts above.

c. Change cell assignment; including placement in Close or Maximum Disciplinary Custody. Such placement will be reviewed weekly by the Program Review Committee as provided for in this Directive and will have a specified maximum duration for each misconduct not to exceed six months.

d. Suspend privileges for specified period of time.

e. Reclassify custody or program status.

G. Program Review Committee

1. The Program Review Committee shall be composed of the Deputy Superintendent for Operations, the Deputy Superintendent for Treatment Services and the Classification and Treatment Supervisor. In the absence or lack of any of the foregoing members, the Superintendent shall designate an appropriate substitute.

2. The inmate shall be entitled to have any decision of the Hearing Committee reviewed by the Program Review Committee at his request.

3. The Program Review Committee shall review at one half of the sentence served or weekly, whichever is the lesser, in those cases of inmates detailed in Administrative Custody or Disciplinary Custody and shall decide whether continued custody in those units is appropriate and necessary in each case. This decision will be based upon a review of the counselor's notes and recommendations, additional entries made on the inmate's record regarding his attitude and actions since placement in the restricted housing or since the last weekly review as well as the misconduct which was the basis of the placement for those cases in Disciplinary Custody.

4. The Program Review Committee, as a Committee, shall interview in person at least once every thirty days, those inmates detained in Administrative Custody or Disciplinary Custody. The determination of whether continued confinement is warranted will be based upon a review of the counselor's notes and recommendations, psychological and psychiatric reports when available, recommendations by other staff and their written observations regarding his attitude and actions and his attitude and actions during the interview. If the inmate is in Disciplinary Custody, the

gravity of the misconduct must also be considered. When the Program Review Committee determines that continued confinement is warranted, the inmate shall be given a written statement of the decision and its rationale. In cases of inmates detained in this status for more than thirty days, it shall be reported to the Commissioner of Correction by the Superintendent with his comments as well as those of the Program Review Committee and the rationale for such status and particular programs prescribed shall be stated. All inmates continuously confined in Administrative and Disciplinary Custody for a period of one year shall be given thorough annual psychological and psychiatric examination during this confinement.

5. The Program Review Committee, in releasing an inmate from Disciplinary Custody, must determine whether the inmate is a threat to other inmates, to staff or to himself or poses a threat of escape and all available records on the inmate shall be reviewed and considered to make this decision. In cases where such a determination is made the Program Review Committee may assign the inmate to either Close or Maximum Administrative Custody in cases where the inmate was released from Maximum Disciplinary Custody or to Close Administrative Custody where the inmate was released from Close Disciplinary Custody. This determination will be made in writing and a copy will be provided to the inmate.

H. Scheduling and procedure for conducting appeal hearings by the Program Review Committee:

1. Upon receiving a request from the inmate for review of the Hearing Committee's decision, the Program Review Committee shall notify the inmate and the Chairman of the Hearing Committee of the time and date set for the review. The inmate may be excluded at the discretion of the Program Review Committee.

2. The inmate, with assistance if desired, shall present his objections to the decision of the Hearing Committee. These may be submitted in written form.

3. The Chairman of the Hearing Committee shall present the reasons for the decision.

4. The Program Review Committee may question both the inmate and the Chairman of the Hearing Committee regarding the facts and the rationale for the decision.

5. The Program Review Committee shall take the matter under advisement and promptly render the decision, together with the rationale, to the inmate and the Chairman of the Hearing Committee.

6. The inmate shall be given a written statement of the decision and its rationale.

7. All decisions of the Program Review Committee shall be reviewed by the Superintendent for his sustaining the decision or amending or reversing the decision in favor of the inmate.

IV. BEHAVIOR CONTROL AND CONFINEMENT

A. General

1. As the result of a general institutional disturbannce or an incident which could result in the loss of control, all inmates may be confined to their own cells upon approval of the officer in charge of the institution. This action may be taken pending the restoration of order and a determination that normal institutional operations can be safely resumed.

B. Individual

1. An inmate who has allegedly committed a Class 1 Misconduct may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution not routinely but based upon his assessment of the situation and the need for control pending application of procedures under paragraph III.

2. Depending upon the situation and the need for control, an inmate who has allegedly committed a Class 2 Misconduct may be removed immediately from his job, restricted in activities or confined to his own cell upon approval of the officer in charge of the institution not routinely but based upon his assessment of the situation and the need for control pending application of procedures under paragraph III. If an inmate has been confined to his cell pending a hearing he will continue to enjoy use of his personal property such as his

own television, radio, etc., except when the alleged misconduct involves the misuse of the item of personal property.

3. An inmate may be temporarily confined to either of the above units in an investigative status upon approval of the officer in charge of the institution where it has been determined there is a threat of a serious disturbance or a serious threat to the individual or others. The inmate shall be notified in writing as soon as possible that he is under investigation and that he will receive a hearing if any disciplinary action is being considered after the investigation is completed. An investigation shall begin immediately to determine whether or not a behavior violation has occurred. If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated but in all cases within ten (10) days.

4. An inmate who requests self-confinement may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution pending review by the Program Review Committee. The Program Review Committee shall document the request by the inmate as well as the reasons for the request and shall determine whether Close or Maximum Administrative Custody is warranted by a review of the reasons and whether continuing confinement is justified or whether a transfer should be recommended.

V. RESTRICTED HOUSING CATEGORIES

The Bureau of Correction for purposes of this Administrative Directive shall recognize the following restricted housing categories for inmates within state correctional institutions.

A. Administrative Custody - for inmates requiring closer supervision or protection than is provided in general population and for temporary assignment of inmates pending further classification. Maximum Custody involves housing in the most secure facilities available in the institution and includes the most intensive scrutiny of all matters pertaining to security and the most restrictive regulation of inmate mobility. Close Custody involves housing in more secure facilities than those used for general population and restricted mobility. The degree of security and restriction of mobility is less than the degree present in maximum custody. Maximum or Close Custody may be designated based on the intensity of supervision and control required.

B. Disciplinary Custody - for inmates found by the Hearing Committee to have committed Class 1 Misconducts. Maximum Custody involves housing in the most secure facilities available in the institution and includes the most intensive scrutiny of all matters pertaining to security and the most restrictive regulation of inmate mobility. Close custody involves housing in more secure facilities than those used for general population and restricted mobility. The degree of security and restriction of mobility is less than the degree present in maximum custody. Maximum or Close

Custody may be designated based on the intensity of the supervision and control required as well as the nature and the particulars of the offense committed.

VI. CARE AND TREATMENT

A. Administrative Custody housing shall be designated as Close and Maximum and will be specified groups of cells in a designated section or sections of the institution as the physical plant permits.

1. The purpose of placing an inmate in this unit shall be to maintain the safety of the institution by segregating an individual who poses a threat to other inmates, to staff or to himself, poses an escape risk or needs protection from other inmates. The decision to place an inmate in this custody must comply with III. G.4., IV. B.1., IV. B.3. or IV. B.4. Determination of whether Close or Maximum Administrative Custody is necessary will be made by the Program Review Committee.

2. The inmates therein shall have all the rights and privileges accorded to the general population except for freedom to move about the institution, freedom to engage in programs with the general population, the use of civilian clothing and the use of items specifically found by the Program Review Committee to be a security hazard. The use of personal radios and televisions may be permitted with the express approval of the Program Review Committee. All other personal property which is permitted in general population will be permitted in Administrative Custody.

3. The inmate requesting the use of an item or to participate in a program permitted in general population not expressly excluded above shall initiate such a request through the request slip process to the Program Review Committee who shall respond within one week.

4. The Program Review Committee may permit a limited release program from Close Administrative Custody as a gradual process to return to general population status.

B. Disciplinary Custody housing shall be designated as Close and Maximum and will be specific groups of cells in a designated section or sections of the institution as the physical plant permits. The initial determination of whether Close or Maximum Disciplinary Custody is necessary will be determined by the Hearing Committee to be later reviewed on a weekly basis by the Program Review Committee as outlined in III.

1. The purpose of placing an inmate in this unit shall be to supervise and control serious disciplinary problems.

2. Inmates confined therein shall not be permitted freedom to move about the institution or to engage in programs with the general population. Inmates in this confinement will be permitted those items or use of those items necessary to maintain an adequate level of personal hygiene as well as a reasonable amount of personal legal materials and correspondence. Inmates in this unit will also be

permitted to visit with their approved visitors consistent with institutional and Bureau regulations, to correspond consistent with Bureau Directives and will be issued those items not already possessed by the inmate necessary to maintain personal hygiene, to correspond and prepare personal legal documents; also three cigarettes or their equivalent per day if requested. Any privilege may be curtailed at the express decision of the Hearing Committee after a Hearing.

C. Inmates in categories A and B above shall receive interviews at least weekly by the institution's professional treatment staff. The Program Review Committee shall release an inmate from Administrative Custody or Disciplinary Custody as soon as appropriate.

D. All misconducts committed while confined in thise categories must be written up and disposed of by the Hearing Committee procedure.

E. A shift commander, chaplain and a medical doctor shall visit inmates in Maximum Administrative Custody and Maximum Disciplinary Custody each day and such visits shall be recorded in the logs.

F. Every thirty days the Superintendent shall personally review the case of each inmate separated from the general population for thirty days or more. he shall maintain a written report of his findings in each such case and together with a copy of the Program Review Committee's report shall submit them to the Commissioner monthly.

VII. SUSPENSION OF DIRECTIVE

In an extended emergency situation or extended disruption of normal institutional routine, any provision or section of this directive may be suspended by the Superintendent for a specific period of time with the approval of the Commissioner of Correction.

The foregoing has been approved by the Department of Justice, Bureau of Correction, and shall be effective October 1, 1978. This supersedes all previous directives on this subject and shall apply to all state correctional institutions and regional correctional facilities.

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Attorney General

William B. Robinson
Commissioner

Amicus Brief

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No. 81-638

IN THE

Supreme Court of the United States

October Term, 1982

LOWELL D. HEWITT, SUPERINTENDENT, ET AL.,
Petitioners,
v.
AARON HELMS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE STATE BAR OF MICHIGAN, PRISONS AND CORRECTIONS COMMITTEE AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

1. Does the taking of an inmate from the general prison population and placing him in potentially indefinite predisciplinary hearing administrative segregation, under conditions identical to disciplinary custody, implicate any State created liberty interests under State law?

2. Assuming liberty interests are created, what process is necessary to reduce the risk of error and avoid arbitrary decision making, when considering the governmental and private interests involved?

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INTEREST OF THE STATE BAR OF MICHIGAN, PRISONS AND CORRECTIONS COMMITTEE

This case presents the question of whether, and to what extent, the Due Process Clause of the United States Constitution applies to the transfer of a prison inmate from general population to administrative segregation. The Michigan Department of Corrections, like its counterpart in Pennsylvania, may transfer an inmate to administrative segregation only upon the showing of certain, specified conditions.

The function of the State Bar of Michigan, Prisons and Corrections Committee is to review and make recommendations upon legislation pending before the Michigan legislature which pertains to the sentencing, parole, and treatment of convicted individuals. The Committee has been actively involved in the review and consideration of legislative bills which effect the placement of inmates in administrative segregation. Michigan has legislation and administrative rules which define when and how an inmate may be placed in segregation, and the procedures which must be undertaken in reviewing the inmate for release therefrom.

The Committee has expended a considerable amount of time and research on the issue of the requirements of the Due Process Clause with regard to placement in administrative segregation. Accordingly, the Committee's interest in the disposition of this case is substantial.

SUMMARY OF ARGUMENT

In jurisdictions which have considered the issue, the evidence has been that prison inmates are entitled to general population status, unless a specific finding is made that a particular inmate should not be so treated. The specialized treatment of an inmate by placement in administrative segregation deprives that inmate of the state-created liberty interest of remaining in general population.

Petitioners assert that administrative segregation is within the normal range of custody to which an inmate is sentenced. It is further stated that administrative

segregation is materially different from disciplinary segregation. While conceding that disciplinary segregation is not within the normal range of custody, the Petitioners argue that, by policy, administrative segregation inmates retain as many privileges of general population inmates as is consistent with the segregation imposed. Whereas, in the case of disciplinary segregation, all privileges may be withdrawn, except as to what is mandated by the Eighth Amendment. In fact, however, administrative segregation inmates are treated in the same manner as the disciplinary segregation inmates. They are almost always in the same cell-block; receive no educational or vocational programming; are unable to engage in regular or group religious activity; and have limited out-of-cell movement. The only difference of substance between administrative segregation and disciplinary segregation is that the former lasts indefinitely, while the latter is limited in duration to short periods of time.

Not only does time distinguish administrative segregation as more onerous than disciplinary segregation, but collateral consequences are also more severe. Loss of assigned housing, loss of program assignments, labelling as a troublemaker, psychological harm, and stigmatization, characterize the administrative segregation inmate, while there is little, if any, collateral consequence which befalls a disciplinary segregation inmate.

In assessing what process is due an inmate prior to placement in administrative segregation, at the very least, the *Wolff* procedures must be mandated. Utilizing

the factors established in *Matthews* v. *Eldridge*, 424 US 319 (1976):

1. The nature of the loss to the administrative segregation inmate is greater than to the disciplinary segregation inmate because of the increased length of the stay in the "hole," and the sequelae from the stay.

2. The risk of error in predicting future misbehavior is greater than in factually determining whether a misconduct has occurred.

3. The risk of error is reduced by hearing safeguards which only require the exercise of informed discretion and the ability of an inmate to explain away his alleged conduct.

4. The administrative burden of providing a hearing has a negligible effect on staff deployment. Whether an official canvasses a prison for reasons to segregate an inmate, or conducts a hearing in one location, does not effect the overall operation of a prison.

While Petitioners assert that placement in administrative segregation is predictive in nature, the action taken is always based on alleged past conduct. To provide hearings in such instances does not interfere with prison officials going about their tasks, but only require the exercise of informed and guided discretion. Rumors, observations, and other traditional indicia relied upon by prison officials might still be utilized, but an inmate would have an opportunity to address the appropriateness of the indicia to him or her.

The informal and rudimentary procedures ordered by this Court in *Greenholtz* v. *Nebraska Penal Inmates*, 442 US 1 (1979), and *Goss* v. *Lopez*, 419 US 565 (1975), are

inapposite to the administrative segregation decision. Parole decisions (*Greenholtz)* involve record facts and public policy decisions, neither of which are involved in the administrative segregation decision. Short school suspensions (*Goss*) involve more limited liberty interests, have some education benefit, and are imposed by qualified educators. The administrative segregation decision imposes lengthy and indefinite stays under extremely harsh living conditions, has no educational or other beneficial effect, and is not imposed by qualified personnel.

ARGUMENT I

THE ABILITY OF AN INMATE TO REMAIN IN GENERAL POPULATION STATUS IS A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

In every jurisdiction where the issue has been litigated, the evidence has shown that prison inmates are granted general population status *absent* some finding that such status is not merited. See, e.g., *Bills* v. *Henderson*, 631 F 2d 1287 (6th Cir. 1980); *Wright* v. *Enomoto*, 462 F Supp 397 (ND Cal, 1976); and cases cited at Respondent's Brief, P. 26. In Michigan, an inmate *must* be placed in general

population unless an inmate can be placed in administrative segregation. The latter status may be imposed *only* when:

A. A resident demonstrates inability to be managed with group privileges;

B. A resident needs protection from other prisoners;

C. A resident is a serious threat to the physical safety of staff or other residents, or to the good order of the facility;

D. A resident is a serious escape threat.

Michigan Administrative Rule 791.4405.

In considering whether the grant of general population status is a liberty interest protected by Due Process of law, this Court must consider the "real" aspects of conditions of confinement in segregation cell-blocks, and the collateral consquences of a stay in the "hole."[1]

A.

The differences between conditions of confinement in Administrative Segregation and punitive detention are insignificant or nonexistent and, therefore, cannot be a basis for differentiating the procedures required for placement therein.

In the Petitioner's Amicus Brief, it is posited that:

> "The essential distinction between administrative and disciplinary detention is that, in the former,

---

[1] The terms of art being used in the law have been variously "administrative confinement" or "administrative segregation." In reality, what is involved here is being placed in the "hole."

> inmates retain as many privileges of general population inmates as are consistent with the requisite degree of segregation, whereas, in the latter, as many privileges may be withdrawn as is consistent with the Eighth Amendment and requisite standards of human dignity."
>
> Brief of Petitioner's Amicus, at 10-11.

It is contended by Petitioner that, "The prisoner confined to administrative custody retains most of the rights accorded to the general population, except for certain privileges inherently inconsistent with restrictive custody." (Petitioner's Brief, at 13.) The relevant Pennsylvania regulation cited by Petitioner reads:

> "The inmates therein shall have all the rights and privileges accorded to the general population except for freedom to move about the institution, freedom to engage in programs with general population, the use of civilian clothing, the use of items specifically found by the Program Review Committee to be a security hazard . . ."
>
> (Brief of Petitioner at 13, 37 Pa. Code § 95.107(a)(2).)

As is pointed out in the Respondent's Brief at Page 27, Note 25, the actual practice in Pennsylvania is to deny Administrative Segregation inmates virtually every right, privilege and activity which accompanies general population status.

Precisely the same situation exists in Michigan. The Michigan Department of Correction's Policy Directives provide:

> "Residents in Administrative Segregation, therefore, shall be afforded all privileges that are

> administratively *feasible* that can be safely allowed . . . *When practicable*, residents *should* be given opportunities to engage in educational, religious and treatment activities. Daily out-of-cell movement must be afforded each person and showers *should* be allowed as often as administratively *possible* but at least weekly."
>
> PD-BCF-60.01 (Emphasis added.)

While the above-stated policy sets forth noble goals, administrative segregation inmates in Michigan prisons are not permitted to engage in religious, education and treatment activities. Furthermore, it has been demonstrated through review of Department records that administrative segregation inmates receive showers once every 8 to 11 days (when the plumbing is working), and receive outside yard on a similar frequency. Even personal property of the inmates is completely prohibited during the first 30 days of administrative segregation, and severely restricted thereafter. Finally, administrative segregation inmates in Michigan prisons are, in almost all cases, housed in disciplinary segregation cells and administrative segregation cells interchangeably, since they are identical and in the same housing units. Accordingly, differences between administrative segregation and disciplinary segregation exist in theory only, and not at all in practice.

While, as pointed out in Respondent's Brief, the case of *Wright* v. *Enomoto*, 462 F Supp 397 (ND Cal, 1976), *aff'd* 434 US 1052 (1978), exposes the fiction that administrative segregation and disciplinary segregation are qualitatively different, it is significant to note that the Michigan Appellate Courts have reached the same conclusion regarding the Michigan system. In *Dickerson*

v. *Marquette Warden*, 99 Mich App 630, 298 NW 2d 841 (1980), inmates contended that they had been placed in administrative segregation without an appropriate hearing. The Michigan prison officials in *Dickerson* took the position that is now advanced by the Petitioner in the present case; they attempted to persuade the Court of the difference between administrative segregation and disciplinary segregation:

> "Mr. Maynard (Administrative Assistant to the Warden, Marquette Branch Prison, Marquette, Michigan):
>
> In cases of this nature, generally, they are instructed that this is not — it's a matter of security classification hearing and they are not to discuss or talk about the incident — the misconduct — the alleged misconduct or the alleged criminal behavior because it may tend to jeopardize their position in the eventual action. And it's merely to decide . . . and to inform them of the decision that they are going to be placed in some form of restrictive custody until the matter is settled."
>
> 99 Mich App at 637-638

The Michigan Court of Appeals rejected the argument of the prison officials:

"The hearing at issue here was termed administrative and not disciplinary. Accordingly, the sanction imposed was termed 'administrative segregation.' The plaintiffs contend, however, and it is not disputed, that administrative segregation is identical to solitary confinement. In either situation, all privileges and rights are

identical . . . Under the circumstances presented by this case, however, and regardless of how the Warden chooses to characterize it, the initial hearing was, in fact, a disciplinary one since: the initial hearing was instituted after specific acts of misconduct had occurred; the punishment imposed was solitary confinement; and the length of solitary confinement, some eight months, was significantly disproportionate to the penalty of 7 days in solitary confinement finally imposed after the plaintiffs were found guilty in a subsequent 'disciplinary' hearing."

99 Mich App at 638.

Thus, the Michigan Courts have placed substance over form and have officially recognized that placement in administrative segregation is the equivalent of the imposition of solitary confinement.

This Court should reject the argument that administrative segregation is not a form of punishment, or that the conditions suffered by the inmates in administrative segregation are less onerous or any different than those suffered by punitive detention inmates. As aptly pointed out in *Wright* v. *Enomoto, supra*, the only difference of substance between punitive or disciplinary segregation and administrative segregation is that the stay in the "hole" for disciplinary reasons is limited, while administrative segregation may last indefinitely.

B.

The collateral consequences which befall an inmate placed in administrative segregation are the same, or more onerous, as those associated with a person placed in punitive detention.

While the conditions of confinement in punitive and administrative segregation are similar, the effects of placement in administrative segregation are generally more serious and potentially devastating. In Michigan, the penalty for violation of an institutional rule includes detention (punitive segregation) of up to 7 days, with the maximum range reserved for only the most serious or persistent violators. Michigan Administrative Rule 791.5505(1)(a). No such limit is applicable to placement in administrative segregation. Thus, it is established that, at least in terms of how long an inmate can be placed in the "hole," the conditions involved are more onerous.

Additionally, as a result of the length of time involved in administrative segregation, an inmate:

1. Will lose his general population cell due to another inmate being reassigned to it. This will necessarily interfere with an inmate's interpersonal relations with his neighbors, and disrupts the emotional security obtained from maintaining and furnishing the individual cell which he occupied;

2. Will more likely lose a work or program assignment than an inmate who serves a short period of time in punitive segregation;

3. Will be more apt to be viewed by the Parole Board and prison staff as a "chronic troublemaker," whereas

an inmate merely required to serve a short punitive detention period is seen as having made a single "mistake;"

4. Will suffer severe psychological harm during and subsequent to an extended stay in the "hole." See, e.g., *Hardwick* v. *Ault*, 447 F Supp 116 at 125 (MD, Ga, 1978). (See Respondent's Brief at 27, et seq.) Michigan assigns extra counselling staff to its segregation cellblock in recognition of this problem. Staff shortages, overcrowding, and high staff turnover prevent effective diffusion of the harm;

5. Will undergo a gradual and lengthy re-incorporation into the general population mainstream, even after his or her release from administrative segregation. By way of example, inmates at State Prison of Southern Michigan at Jackson are almost always moved from the administrative segregation unit to "4" Block. This Block, while general population by designation, has a certain unofficial "stigma" attached to it because of its being a repository for releasees from segregation. As a result, staff is less tolerant; jobs given to residents in that unit are more menial; yard time is more restricted (unofficially); and other privileges generally are interfered with (i.e., because of special "count" procedures, inmates who have programming after dinner are frequently as much as ½ hour late to their class.).

Thus it is seen that the effect of time alone on an inmate in segregated confinement differentiates his position from the inmate in punitive detention. With conditions of confinement between the two types of status being virtually indistinguishable, it is compellingly established that administrative segregation is more onerous than punitive detention.

II.

THE PROCESS DUE AN INMATE PRIOR TO BEING DEPRIVED OF GENERAL POPULATION STATUS IS AT LEAST THE PROCEDURES OUTLINE IN WOLFF V. McDONNELL.

In assessing what process would be due an inmate facing placement in administrative segregation, the factors have been adequately set forth by the Petitioner's and Respondent's Brief, and redundancy will be avoided. It remains to be stressed, however, that the nature of the administrative segregation decision requires at least the same, if not more, process than the punitive detention decision.

In an obvious way, administrative segregation should merit at least the protections mandated by *Wolff* because, as set forth in the previous argument, conditions in the segregation cell blocks parallel those of punitive detention, except that administrative segregation lasts longer and indefinitely. Cf., *Wright* v. *Enomoto*, 462 F Supp 397, 403-4 (ND Cal, 1978). In fact, under the balancing test required by *Matthews* v. *Eldridge*, 424 US 319 (1976), the *nature* of the loss to the administrative segregation inmate is greater than the punitive detention inmate because of the length of the time involved.

Furthermore, as is ably pointed out in Respondent's Brief at 35-39, there is a grave *risk of error* in predicting future misconduct. There is a great deal of professional literature which sets forth several basic difficulties in predicting human behavior, and, further, questioning whether the field of prediction has attained acceptable scientific levels. See, generally, Monahan: *The Clinical Prediction of Violent Behavior*, U.S. Department of Health

and Human Services Publication No. (Adm) 81-921, (1981); American Psychological Association, *Report of the Task Force on the Role of Psychology in the Criminal Justice System; American Psychologist*, 1978, 33 1099-1113. Cocozza, J., and Steadman, H.: *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 Rutgers Law Review, 1084 (1976).

In determining whether specific misconduct occurred *in the past (Wolff)*, the risk of error is not nearly as great. Thus, in terms of the private interests involved, and the risk of error, the need for greater protections in the administrative context, as opposed to the misconduct context, is indicated.

The safeguards requested by the Respondent clearly would reduce the *risk of error*. The requirement of specific findings of fact on the triggering event is obviously a beneficial safeguard. Cf., *Bills* v. *Henderson*, 631 F 2d 1287 (6th Cir. 1980). The further requirement of a written statement by the fact-finder as to the evidence relied on and the reasons for the actions taken, mandates only the exercise of *informed* discretion, as opposed to arbitrariness. Significantly, neither of these requirements would change what corrections officials (i.e., Petitioners) are requesting; they may certainly rely on those matters which indicate to them that action is necessary. (i.e., suspicious meetings and activities. See, Argument IIb.) They need only place in writing the basis upon which they've made the decision, so that, upon a subsequent review, the presence or absence of arbitrariness may be determined. Furthermore, if the basis for placing someone in segration is not defined, the determination of when segreation should end will be left to mere guesswork.

It is noteworthy that neither the Respondents nor their Amicus make credible arguments regarding the *administrative burden* of providing hearings. The State's Brief stresses, not that there would be a burden, but, rather, their discretion should be unfettered because this is an area of security. (Petitioner's Brief at 25) This argument begs the question of burden.[2] The only argument advanced by the State that a burden is involved is that staff would be diverted. The Petitioners do not, however, give the Court a factual analysis of the weight of that burden. It is submitted that the burden is not significant in that the time involved in the truncated trial proceedings requested by Respondent are not significantly greater than the ex parte proceedings advocated by the Petitioners. Whether a prison official traverses the prison seeking evidence, as opposed to conducting a due process hearing, results in very little loss of time to the administration, with the beneficial gain of giving an inmate a meaningful opportunity to be heard. Furthermore, the status review procedures advocated by the Petitioners and their Amicus consume as much, if not more, time as the due process hearing requested by the Respondents to be conducted prior to placement in administrative segregation.

While this argument to this point has addressed generally the factors of *Matthews* v. *Eldridge*, the arguments below specifically address some of the issues raised in the Petitioner's and their Amicus' Brief.

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[2] No party to this matter questions the ability of prison officials to transfer an inmate prior to providing a hearing during the existence of an emergency. Thus, the "burden" of a hearing does not affect the immediate security of a facility.

A.

Respondent Helms' placement in Administrative Segregation was based on a specific act of misconduct, and was not a "predictive" decision of the prison officials.

After a disturbance at the State Correctional Institution at Huntingdon, Pennsylvania, Helms, along with many other inmates, was charged with a disciplinary rule infraction. Following his charge, Helms was held in administrative segregation for 51 days awaiting a disciplinary hearing. During this time, an investigation was conducted by the State Police, and criminal charges were brought. Even though the criminal charges were subsequently dismissed, and even though most of the other inmates claimed to be involved in the disturbance were given disciplinary hearings, Respondent was not given such a hearing. During these 51 days, the prison officials made no effort to determine the one question presented: Did Helms participate in, or was he otherwise improperly involved, in the distrubance?

In the Briefs of the Petitioners and their Amicus, the premise that administrative segregation "involve[s] no more than informed predictions" is cited as a distinguishing factor from the disciplinary process which is "conditioned upon the occurrence of a specified event." (Brief for Petitioners at 23; Petitioner's Amicus Brief at 2-3) The Petitioner's position is also based upon the differences in Pennsylvania regulations, which are in the form of "broad generalized language," when referring to administrative detention and "extremely detailed" when referring to the disciplinary segregation process. (Brief of Petitioner's Amicus, at 2.)

In brief, it is the general propostion of the government officials involved that a clear, "bright line" distinction exists between the purposes and processes of administrative segregation as opposed to those supporting disciplinary detention.

Contained within the facts of this case is the rebuttal of that proposition. Respondent's placement in segregation was based on a specified event, i.e., his alleged involvement in a prison disturbance. Nothing in Petitioner's or their Amicus' Brief suggests a generalized "prediction" that he was a threat to the good order and security of the prison *but for* his alleged involvement in the prison disturbance.

In Michigan, the identical bifurcated system of segregation exists. As in Pennsylvania, the decision in Michigan as to whether the disciplinary or administrative segregation process is used, is completely dependent upon the discretion of the prison officials involved.[3] To permit placement in administrative segregation for an indefinite period of time without a hearing on the basis of past, specific misconduct, would encourage prison staff to pursue that route over the disciplinary process for the sake of convenience. This is a result that this Court cannot countenance.

In Michigan, as in Pennsylvania,

"1. Administrative segregation may be imposed only when:

a. A resident demonstrates inability to be managed within group privileges.

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[3] In Michigan, segregation of both administrative and disciplinary nature requires a *Wolff* type hearing. Thus, prison officials cannot escape the hearing requirement merely by choosing one process over another. See, MCLA 791.251(a) and 791.251(b).

b. A resident needs protection from other prisoners.

c. A resident is a serious threat to the physical safety of staff or other residents or to the good order of the facility.

d. A resident is a serious escape threat."

Michigan Administrative Rule 791.4405. Cf. Pennsylvania Rule BG-ADM801, ¶VI. A.1; 37 Pa. Code, § 95.107(a)(1).

The cited Pennsylvania provisions do not countenance the placement of Helms into administrative segregation unless they are interpreted as allowing the commission of an act of misconduct to serve as an acceptable basis. It is clear that, in fact, prison officials in Pennsylvania can, and do, interpret the regulation regarding administrative segregation to encompass a single act of misconduct to satisfy their regulations. Thus, it is contended herein that the decision to process an inmate through either the administrative or disciplinary segregation process is a mere judgment call on the part of prison officials.

Were there any merit to the proposition that a "bright line" distinction existed, "prediction" of an inmate's unsuitability for general population must be based upon past acts which, in a cumulative sense, aid the prison officials in their predictions. For example, in both Michigan and Pennsylvania, placement of a prisoner in administrative segregation for his own protection would be a result of either a threat of violence, an act of violence, or some physical aspect of an inmate which would cause prison officials to believe an inmate was in jeopardy of harm. It is unrealistic to believe that something less than a specific incident or incidents

would provide prison officials with a basis upon which to determine an individual's need for protection. Without the existence of some *factually determinable* act, which causes prison officials to determine that an inmate needs protection, prediction then would be based on nothing more than improper surmise or unsubstantiated guesswork. Cf. *Bono* v. *Saxbe*, 620 F 2d 609, 616 (7th Cir, 1980).

Similarly, the decision to place a prisoner in administrative segregation because he is predicted to be a threat to the safety of staff, other prisoners, or the good order of the facility, can only be based upon the occurrence or occurrences of specific past actions, when viewed in the light of how these actions relate to potential future actions.

There is little doubt that prison officials must have the ability to administratively segregate an inmate who they believe poses a threat to prison security and order. It can be only upon the basis of past acts, however, which allows for a prediction. Otherwise, the act of prediction is relegated to nothing more than unfounded speculation, surmise or soothsaying. Respondent Helms was placed in administrative segregation because he was alleged to have been involved in a prison disturbance. The crux of the issue is whether or not he was involved, and that is a factual matter, not a question of prediction.

B.

The need of prison officials to maintain control based upon other than pure factual determinations of a prisoner's act of misconduct is not jeopardized by requiring a Wolff type due process hearing.

In the Brief of Petitioner's Amicus, it is correctly proposed that, "indicia of threats to . . . internal order, however, are frequently highly subjective and subtle." Relying on the ability of prison decision makers to take ambiguous occurrences and determine that preventative custody is required, Petitioner's Amicus determines that a due process, fact-finding hearing is inapposite to that decision-making process. Petitioner's Amicus Brief at 8. The Amicus cites such factors as clustering of inmates, particularly when a known inmate leader is involved; an increase or decrease in the flow of inmates to food service or recreation areas; an increase or decrease in vandalism; an increase or decrease in rumors; the noise level of inmate groupings; disturbances in other institutions; reports of mistreatment; racial and other tensions. The Amicus then concludes that it would be "foolhardy" and unfair to other inmates to prohibit prison officials from acting on such signals. Petitioner's Amicus Brief at 9.

Clearly, prison officials must be allowed to respond to these types of exigencies. Yet, in their examples, the things referred to are general occurrences which apply to the total atmosphere of the prison setting, and the entire population. As occurred in Michigan in May of 1981, the response of the Michigan Department of Corrections to such symptoms was to institute a general "lock-down."

The example used by Petitioner's Amicus of the "clustering of inmates, particularly when a known inmate leader is involved," is more relevant to the issue at hand. The Amicus would most likely allow that "inmate leader" to be placed in administrative segregation without determining whether some reason other than fomenting rebellion was the basis for his presence in the midst of the inmates. *As ocurred during the Michigan disturbances, inmate leaders had been requested to mingle with groups of inmates, and did so on their own, in order to quell the disturbance.* Inmate leaders were publicly identified as having helped quell and limit the disturbances.

The procedures required by *Wolff* v. *McDonnell* would not prohibit prison officials from administratively segregating an inmate leader in a situation where he was fomenting a disturbance. As has been indicated elsewhere (see, Note 3., p. 14 herein.), an inmate leader, thought to be fomenting a disturbance, could be placed temporarily in administrative segregation. The imposition of *Wolff* procedures would only require that he be notified of the reasons why he was placed in segregation; be given at least 24 hours to prepare his defense; and, at the ensuing hearing, he would have an opportunity to rebut the allegations against him. In virtually all instances, the inmate would either be able to rebut the allegations that were made against him by the presentation of credible testimony that he was indeed attempting to quell the disturbance, or be convicted upon the showing by knowledgeable prison staff that the actions at issue indicate that the inmate was guilty of creating a disturbance. The giving of a hearing to an inmate regarding what actions occurred in the past, in no way interferes with the prison's ability to segregate

inmates or rely on traditional indicia of difficulties; rather, the procedures require non-arbitrariness in the placement of inmates in administrative segregation.

The benefit of a *Wolff* hearing inures to the benefit of all parties since, as occurred in Michigan, an inmate leader would be able to offer proof that his purposes for being in the cluster of inmates was based on the request of a prison official or some other non-threatening reason. To provide a hearing even to those inmates who are "suspected" or "rumored" to be creating a security problem, would not only result in avoiding the error of placing an innocent inmate into segregation, but would also allow prison officials to quickly focus in on the real source of their prison problems.

C.

The decision to place an inmate in administrative segregation is materially different from the decision to grant parole or suspend a student for a short period of time and, accordingly the procedures required for such decisions should also be different.

The Petitioners and their Amicus strongly assert the position that, if placement in administrative segregation triggers due process protections, the process due should not be the *Wolff* procedures, but rather, should be akin to those required in *Greenholtz* v. *Nebraska Penal Inmates*,[4] 442 US 1 (1979), or *Goss* v. *Lopez*,[5] 419 US 565 (1975). Such a position fails to address the essential differences between the situations in those cases compared to the present one.

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[4] Petitioner's Brief at 23, 25; Amicus Brief at 27.

[5] Petitioner's Brief at 27.

In *Greenholtz*, this Court found that the inquiry into a parole decision was an "equity" type judgment which involved *record* facts (i.e., established behavior over the pre-parole hearing time period, as evidenced by reports of guard counsellors, misconduct reports, and programming achievements) and personal observations of the Parole Board leading to a predictive judgment as to what was best for the inmate *and the community*. 442 US at 8. The latter consideration was found to include considerations extrinsic to the behavior of the inmate, to-wit: minimizing the gravity of the offense, weakening the deterrent impact on others and undermining respect for the administration of justice. Id, at 8.

To the contrary, the decision to place a person in administrative segregation does not, in most cases, involve "record facts." In virtually every instance, some alleged event or series of events triggers a desire on the part of corrections officials to segregate an inmate. Fact-finding with regard to this aspect of administrative segregation differentiates the situation from parole review, where review is not triggered by an event, but, rather, arises periodically and automatically.

Furthermore, administrative segregation decisions do not contemplate such societal interests as set out in the *Greenholtz* opinion. An inmate is placed in administrative segregation for the limited purposes set forth by regulation and other rules; generally either security or self-protection. Policy is not involved.

In *Goss* v. *Lopez*, this Court required "rudimentary" due process procedures for short school suspensions not exceeding 10 days. 419 US at 584. The Petitioners would have this Court apply the same informal "rudimentary" procedures applied to short school suspensions to the administrative segregation decision.

The nature of the interests involved are distinctly different. First, this Court was careful to point out the narrowness of the *Goss* ruling: that short suspensions require only rudimentary procedures, while longer suspensions and unusual situations may require something more. The administrative segregation process, however, involves the *lengthy* and *indefinite* retraction of a liberty interest. Second, lengthy suspension proceedings not only would test educational resources, but the escalation of formality would destroy the effectiveness of brief suspensions as a *teaching process*. Id, at 583. There is no credible claim that summary placement in administrative segregation advances any peneological purpose. To the contrary, frustration, anger, and distrust are certain sequelae to arbitrary placement in the "hole."

Third, there is an essential difference in the decision-maker involved. In the educational context, educators with college degrees and special training in counseling are involved in determining what disciplinary measure is most appropriate. In the penal context, low or middle level corrections officials, with little or no formal training, are making such a decision.[6]

This Court has, on numerous occasions, deferred to the expertise of prison officials in matters of prison security. While policy decisions from the upper echelons of state Departments of Corrections at least arguably merit this deference, the same cannot be said of the

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[6] In parole decisions, a body independent of the corrections system, and specially trained in making such decisions is involved. Thus, the deference to the parole decision makers exhibited in the *Greenholtz* opinion is not justified in the administrative segregation decision.

lower levels of this particular executive department. As was stated by Jessica Mitford in *Kind and Usual Punishment: The Prison Business* (Random House, Vintage Books Ed, 1974):

> "[m]any become guards because they have no other choice of livelihood. Their pay is low, the civil service standards are minimal, they are generally considered to be at the bottom of the law-enforcement barrel. A reading of recent congressional hearings on prison conditions reveals, not unexpectedly, that beyond those men and women who become guards because they have no alternative, this occupation appeals to those who like to wield power over the powerless and to persons of sadistic bent."
>
> Id at 10.

Not only are officials not properly trained for such decisions, but the officials who decide placement in administrative segregation have primary functions unreleated to the segregation decision. For example, in Michigan, the paper work which assigns an inmate to the segregation cell block must be signed by Assistant Deputy Wardens, or their designated subordinates. The primary duties of these officials include the ordering of sanitation supplies, maintenance supplies, the operation of industry, the provision of food, and, in general, the mechanical operation of the prison. But, the true decision is made even below this level of official. The complaining guard will take the paper work to a "control center," where other guards initially approve or disapprove the administrative segregation request. If the administrative segregation request is denied, the process

stops there. If it is approved, the paper work is sent to the Assistant Deputy Wardens where they are "rubber stamped" as approved. The real decision-maker, the control center guard, is in charge of staff complements, visiting procedures, and the day-to-day operation of the prison.

Accordingly, deference to the prison officials' expertise in the prediction of misbehavior is not justified. And, for this reason, and the reasons set forth above, the procedures required for placing an inmate in administrative segregation should be greater than those required by the *Greenholtz* and *Goss* decisions.

CONCLUSION

WHEREFORE, it is prayed that the judgment of the Court of Appeals be affirmed, as modified in the Brief of Respondent, on the merits.

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2

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NO. 81-638

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LOWELL D. HEWITT, SUPERINTENDENT, ET AL.,
PETITIONERS

V.

ARRON HELMS, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR SUSQUEHANNA LEGAL SERVICES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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Petition Filed September 24, 1981

Certiorari Granted March 8, 1982

QUESTIONS PRESENTED: Susquehanna Legal Services will address the following questions

1. DOES THE TRANSFER OF AN INMATE FROM THE GENERAL PRISON POPULATION TO AN INDEFINITE TERM IN ADMINISTRATIVE SEGRAGATION, UNDER CONDITIONS IDENTICAL TO DISCIPLINARY SEGREGATION, IMPLICATE A DUE PROCESS LIBERTY INTEREST UNDER PENNSYLVANIA LAW OR DIRECTLY UNDER THE DUE PROCESS CLAUSE OF THE CONSTITUTION?

2. ASSUMING A LIBERTY INTEREST IS CREATED, WHAT PROCESS IS NECESSARY TO REDUCE THE RISK OF ERROR AND AVOID ARBITARY DECISION MAKING, WHEN CONSIDERING THE GOVERNMENTAL AND PRIVATE INTEREST INVOLVED?

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B. The right of Respondent to remain free from administrative segregation, absent substantial justification, stems from the Due Process Clause itself in that such confinement is not within the normal range of confinement to which a prison sentence in the state of Pennsylvania subjects an individual. 20

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-638

LOWELL D. HEWITT, SUPERINTENDENT,
ET AL., PETITIONERS

V.

ARRON HELMS, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR SUSQUEHANNA LEGAL SERVICES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF SUSQUEHANNA LEGAL SERVICES

This case raises the question of whether a Pennsylvania state prisoner may be placed in administrative segregation by prison officials, pending investigation into disciplinary and/or criminal charges without due process protections. The Court of Appeals, in the present case,

held that the Pennsylvania State regulations in question create a liberty interest 'n such prisoners to remain free from administrative segregation absent the occurence of specific events. Once having found the existence of a liberty interest based in state law, the Court of Appeals required certain procedural protections to be applicable to such transfers in order to protect the prisoner's liberty interest.

Susquehanna Legal Services is often involved in civil rights litigation on behalf of prisoners which include claims based upon the theory that due process rights have been violated as a result of administrative segregation, or, as here, pre-hearing administrative segregation where a prisoner is under investigation. Indeed, the undersigned served as counsel for Plaintiff in Drayton v. Robinson, 519 F. Supp. 545 (M.D. Pa. 1981) in which Plaintiff's Motion for Partial Summary

Judgment was partially granted in reliance upon the decision of the Court of Appeals in the present case. The Drayton decision is currently on appeal.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

I.

A. The United States Court of Appeals for the Third Circuit found that the Respondent, Arron Helms, was entitled to due process protections prior to his transfer to administrative segregation by Pennsylvania prison officials. The Court of Appeals based its ruling upon the decisions of this Court in Enomoto v. Wright, 434 U.S. 1052 (1978) and Vitek v. Jones, 445 U.S. 480 (1980). In those cases, this Court held, inter alia, that, based upon state law, Nebraska state prisoners

1. Although Susquehanna Legal Services no longer represents the Plaintiff in Drayton v. Robinson, supra, it is our feeling that the decision is none the less important insofar as it affects the rights of other clients within our program area.

possess a liberty interest to remain free from administrative segregation and from involuntary transfer to a state mental institution for treatment.[2] The Court of Appeals was correct in looking to Pennsylvania state law to determine whether a state-created liberty interest existed in the present case.

The Court of Appeals was also correct in finding that such an interest existed by reason of 37 Pa. Code §95.107 (a)(1) and by sections 95.104(b)(1); 95.104(b)(3); and 95.104(b)(4) which limit the discretion of Pennsylvania prison officials to place an inmate in administrative segregation.

The decision of the Court of Appeals that Pennsyvlania state regula-

2. The decisions in Enomoto and Vitek also held that the due process clause, independant of state law, protects the liberty interests involved in those cases. Wright v. Enomoto, 462 F. Supp. 397 at 402; Vitek v. Jones, 445 U.S. at 494.

tions create a liberty interest in state prisoners to remain in the general population is consistent with prior decisions of other Pennsyvlania Federal Courts. Such liberty interests were held to exist in U.S. Ex Rel Hoss v. Cuyler, 452 F. Supp. 256 (E.D. Pa. 1978); and in Mims v. Shapp, 457 F. Supp. 247 (W.D. Pa. 1978).

Further, pursuant to the decisions of this Court in Goss v. Lopez, 419 U.S. 565 (1975); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Wolff v. McDonnell, 418 U.S. 539 (1974); and Morrissey v. Brewer, 408 U.S. 471 (1972), it is the nature of the right at stake which will determine the applicability of due process protections and not the weight of that interest. Because Pennsylvania state law specifically creates a liberty interest in

remaining free from administrative detention, it cannot be argued that no procedural protections should apply based upon the claim that confinement in administrative segregation is not severe.

B. While the Court of Appeals did not reach the question of whether Respondent posssessed a liberty interest which stems from the due process clause itself, Helms v. Hewitt, 655 F2d 487 at 491 n. 5, it is asserted that the nature of the interest at stake does invoke the protections of the due process clause regardless of state law. In Enomoto v. Wright, 434 U.S. 1052, this Court affirmed the decision of the District Court for the Northern District of California which held that prisoners in that state possess both a state-created liberty interest and an interest stemming directly from the due process clause to remain free from administrative segrega-

tion. In Vitek v. Jones, 445 U.S. at 489 this Court cited Wright for the proposition that due process protects state-created liberty interests. However, this Court has never specifically ruled upon the question of whether the due process clause itself protects such an interest.

Absent the protections of the due process clause itself, state and federal prison officials would be free to repeal regulations governing transfers to onerous conditions of confinement for any reason or for no reason at all. (See: Brief for Petitioners at 17; Brief for United States at 21). Such a situation would be inconsistent with the rule in Vitek v. Jones, 445 U.S. at 494, that, absent due process protections, a prisoner cannot be subjected to treatment which is outside of the normal range of confinement imposed upon him for conviction of a crime.

II.

The Court of Appeals ruled that the

due process protections set forth in Enomoto v. Wright, 434 U.S. 1052 and Wolff v. McDonnell, 418 U.S. at 563-570 are applicable to Respondent's transfer to administrative detention. Helms v. Hewitt, 655 F2d at 500.

Susquehanna Legal Services, on behalf of the Respondent, agrees with this ruling insofar as it requires due process protections prior to a transfer of a prisoner to administrative segregation. Pursuant to the ruling of this Court in Matthews v. Eldrige, 424 U.S. 319 (1976), the Court of Appeals properly weighed the interest of the Respondent in avoiding administrative detention, the risk of an erroneous transfer to such segregation, and the interest of the state in maintaining security and order within its prisons.

Although the Court did not reach the question of whether additional protec-

tions should be required, it is submitted that due process requires periodic reviews of the status of an inmate in administrative detention. The purpose of such reviews is to determine whether there is a valid and subsisting reason for prolonged administrative segregation. Other Courts which have considered this question have consistently held such reviews to be required. U.S. Ex Rel Hoss v. Cuyler, at 283; Mims v. Shapp, 457 F. Supp. at 252; Drayton v. Robinson, 519 F. Supp. at 548-549.

It is therefore submitted that the decision of the Court of Appeals should be affirmed as modified to reflect that the due process clause itself, in addition to Pennsylvania state law, applies to protect the interest of an inmate to remain free from transfer to administrative segregation and that the procedural protections required include periodic reviews of a

prisoner's status where his confinement in such detention lasts for thirty (30) days or longer.

I. RESPONDENT, AT THE TIME OF HIS TRANSFER TO ADMINISTRATIVE SEGREGATION, POSSESSED A LIBERTY INTEREST TO REMAIN FREE FROM ADMINISTRATIVE SEGREGATION BASED UPON PENNSYLVANIA STATE LAW AND UPON THE DUE PROCESS CLAUSE ITSELF.

A. Pennsylvania regulations create a liberty interest in that as they restrict the discretion of prison officials to transfer prisoners to administrative segregation.

In its opinion in this case, the Third Circuit held that the regulations of the Pennsylvania Bureau of Correction create a liberty interest in the Respondent to remain free from confinement in administrative segregation absent the occurrence of specified events. Helms v. Hewitt, 655 F2d at 496-497. Following the memorandum decision of this Court in Enomoto v. Wright, 434 U.S. 1052 (1978), the Court held that the procedures required therein constitute the minimum procedural protections applicable to

Helms' confinement.[3]

In so holding, the Third Circuit relied heavily upon the decisions of this Court in Wright, and Vitek v. Jones, 445 U.S. 480 (1980). In Vitek, this Court considered whether, under Nebraska law, a state prisoner could involuntarily be transfered to a state mental institution for treatment absent procedural due process protections. The holding of this Court that such protections are required was based, in part, upon the finding that the relevant Nebraska statute created a

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The procedures required were a 24-hour advance written notice of the proposed action, a written statement by the fact finders as to their decision and the evidence relied upon, an opportunity to call witnesses and present documentary evidence, and assistance from a prison staff member or an inmate where necessary. Wright v. Enomoto, 482 F. Supp. at 405.

protectable liberty interest in limiting the discretion of prison officials to implement such a transfer to those situations where a designated physician finds that the prisoner suffers from a mental disease or defect that cannot be treated in the prison. id. at 483. In its holding, this Court distinguished the Vitek Plaintiff's situation from the factual context of Meachum v. Fano, 427 U.S. 215 (1976), Montayne v. Haymes, 427 U.S. 236 (1976) and Greenholtz v. Nebraska 442 U.S. 1 (1979) in that no such state created interest to remain free from transfers from one prison to another, or to parole, existed in those cases.

The Third Circuit, in the case at bar, applied the same analysis in finding a state-created liberty interest. Looking to the relevant regulations of the Pennsylvania Bureau of Correction, the

Court found that Helms' transfer to administrative segregation, pending an investigation by state police, could not legally be accomplished absent a finding that such confinement is necessary because of a threat of serious distrubance or a serious threat to the individual or others. See: 37 Pa. Code §95.104(b)(3); BC ADM 801 IV B 3. Said regulation implicates a liberty interest in that it requires release of an inmate who is confined in investigative status within ten (10) days, and because it specifies that the officer in charge of the institution determine that a threat of serious distrubance or a serious threat to the individual or others exists.

It should be noted that the Court of Appeals specifically allowed for confinement of a prisoner in administrative

segregation without a prior hearing in the presence of "exigent circumstances". Helms at 499-500; Brief of Respondent at 21. However, it is clear that there is no evidence in the record that such exigent circumstances existed. Thus, once such a state-created interest was determined to exist, the Court concluded that Respondent was entitled to due process protections before he could be placed in administrative segregation.

The decision of the Third Circuit in the present case is consistent with the findings of other courts which have examined Pennsylvania regulations governing segregation of inmates for administrative reasons. In U.S. Ex Rel Hoss v. Cuyler, 452 F. Supp. 256 (E.D. Pa. 1978), Judge Luongo, of the Eastern District of Pennsylvania, examined the 1977 version of the Pennsylvania regulations found at 37

Pa. Code §95.104(b); BC ADM 801 IV B,[4] and found that such regulations create a liberty interest in remaining within the general population. In its opinion, the Court noted that the regulation limited the discretion of Pennsylvania prison officials to place an inmate in administrative segregation to those situations where the criteria were met. id. at 289-290. Similarly, in Mims v. Shapp, 457 F. Supp. 247 (W.D. Pa. 1978), Chief Judge Weber, relying upon the decisions in Hoss, supra, and Kelly v. Brewer, 525 F2d 394 (8th Cir. 1975), held that the Plaintiff's prolonged confinement in administrative segregation, absent the application of objective criteria by prison officals and absent a written statement

4. The language of the present version of 37 Pa. Code §95.104(b) is, in all significant respects, identical to the 1977 version.

of the officials' reasons for their decision, violated Plaintiff's right to procedural due process. Mims at 251-252. The Court further required the Defendant prison officials, in light of Plaintiff's good behavior in the segregation unit, to develop a program to allow the Plaintiff to spend a significant amount of time each week to participate in activities in which he might demonstrate a "changed attitude" which would support a decision to release him to the general population. id. at 252.

The Petitioners and the United States argue throughout their Briefs that a prisoner who is subjected to segregation for administrative reasons is not subject to conditions which are as severe as those in "disciplinary segregation", and, therefore, such placement does not implicate

a liberty interest within the meaning of the Fourteenth Amendment. (Brief of Petitioners at 13; Brief of United States at 5; 10-11).[5] Assuming, arguendo, the truth of this assertion, Respondent's claim that due process protections apply to protect state-created liberty interests are not defeated thereby. In Goss v. Lopez, 419 U.S. 565 (1975), this Court specifically held that it is not the weight of the interest that determines the need for due process protections but the nature of the interest that is determinative. id. at 576-577. Other decisions of this Court have consistently upheld and applied this analysis. Wolff v. McDonnell, 418 U.S. at

5.

As is pointed out in the Brief for Respondents at page 27, n. 25, there is no evidence in the record to support the contention that administrative segregation is less severe than disciplinary segregation. In fact, undisputed evidence in the record leads to the opposite conclusion.

557; Morrisey v. Brewer, 408 U.S. at 481; Greenholtz v. Inmates of Nebraska Penal Correctional Complex, 442 U.S. 1 at 7 (1979). Thus, where, as here, state law creates an expectation on the part of the individual to remain free from confinement in administrative segregation absent the occurrence of specific events, due process protections apply as long as the loss involved is not deminimus. Greenholtz, supra, at 7. That Helms interest in remaining free from administrative segregation is not deminimus is clear from the contents of his affidavit which he filed with the District Court. (Affidaivt of Aaron Helms, 35a-36a).

Therefore, the assertion by Petitioners and the United States that the weight of the interest at stake in the present case should determine the question of whether a state-created liberty

interest exists is at odds with prior decisions of this Court.

B. The right of Respondent to remain free from administrative segregation, absent substantial justifications, stems from the due process clause itself in that such confinement is not within the normal range of confinement to which a prison sentence in the state of Pennsylvania subjects an individual.

In Wolff v. McDonnell, 418 U.S. 539, this Court considered, in part, whether Nebraska prisoners were entitled to due process protections prior to the revocation of "good time" credit or the imposition of disciplinary segregation. The issue was decided on the basis of Plaintiff's entitlement to good time credits and to remain in the general population under existing state law. In addition, while the Court specifically found that the Constitution itself does not

guarantee "good time" credits, id. at 557, it did not specifically rule upon whether the due process clause of the Fourteenth Amendment protects an inmate's interest to remain free from disciplinary or administrative segregation from the general population, regardless of state law. It is reasonable to conclude that, once sentenced to a specific period of confinement for the violation of a state criminal law, the due process clause will not require that the sentence be shortened for good behavior on the part of an inmate. However, it is submitted that the issue of whether the due process clause protects a prisoner from arbitrary transfers to administrative or disciplinary segregation is a separate question. In Enomoto v. Wright, 434 U.S. 1032, this Court affirmed the decision of the District Court for the Northern District

of California which held that the prisoner's liberty interest to remain free from administrative segregation is protected directly by the due process clause as well as by state law. The District Court's holding was based upon the fact that such transfers constitute a severe impairment of the residium of liberty which a prisoner retains after a lawful conviction. Wright v. Enomto, 462 F. Supp. at 402. In its decision, the District Court considered the decisions of this Court in Montayne v. Haymes, 427 U.S. 236 and Meachum v. Fano, 427 U.S. 215 which held that a prisoner has no right to remain confined within a particular prison absent a state-created liberty interest. In distinguishing those cases, the Court noted that:

> Meachum and Montayne hold only that some discretionary decisions of prison officials, such as the decision to transfer a prisoner

> to another institution, do not result in such a substantial invasion of a prisoner's liberty interest as to trigger the need for due process protections. The Supreme Court explicitly stated that the transfer decisions did not result in confinement in maximum security segregation. id. at 402 (citations omitted).

The Wright Court recognized the serious implications of a holding that, absent a state-created liberty interest, prison officials are free to transfer any inmate to disciplinary or administrative segregation "for any reason or no reason at all." Citing the decision of this Court in Wolff v. McDonnell, 418 U.S. 539, the Court recognized the fact that "the imposition of solitary confinement represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. id. at 402 (citation omitted).

In Vitek v. Jones, 445 U.S. 480, this Court cited its affirmance of Wright

for the proposition that state-created liberty interests are protected by the due process clause. id. at 489. This was noted in the opinion of the Third Circuit in the present case. Helms v. Hewitt, 655 F.2d at 496. However, this Court has never expressly ruled upon the question of whether the due process clause itself protects an inmate from disciplinary or administrative transfers to solitary confinement.

In Vitek v. Jones, 445 U.S. 480, it was held that a prisoner is protected by the due process clause from arbitrary transfers to a state mental institution for treatment. The Court specifically indicated that due process protections apply to decisions of prison officials which operate to change the prisoner's condition or degree of confinement such that it is no longer within the normal

range of confinement to which he would normally be subjected by the fact of his conviction. id. at 494.

Both the Petitioners and the United States argue that permanent confinement in administrative segregation of all prisoners would not violate the Eighth Amendment or any other constitutional provisions and that such confinement is otherwise within the contemplation of a sentence upon conviction. (Brief of Petitioners at 15, Brief for United States at 12). It is submitted that the record in the present case does not support the conclusion urged by the Petitioner and the United States. To the contary, the record in this case clearly shows that the conditions of confinement to which Helms was subjected in administrative detention, absent specific justifications, would violate the Eighth Amendment prescription against cruel and unusual punishment. Further, prolonged

solitary confinement under the conditions described by the Respondent would clearly result in mental and/or physiological harm and is therefore not within the "normal range of confinement" to which prisoners in Pennsylvania are subjected by the means of their convictions.

It is undisputed that any confinement of a prisoner by state officials which causes degeneration or threatens the physical or mental health of an inmate is in violation of the Eighth Amendment. Rhodes v. Chapman, 452 U.S. 337 (1981); Hutto v. Finney, 437 U.S. 678 (1978); Ramos v. Lamm, 639 F.2d 559 (5th Cir. 1980); Battle v. Anderson, 564 F.2d 388 at 393 (10th Cir. 1978).

The affidavit of the Respondent, filed with the District Court, shows that he was held in his cell virtually twenty-four (24) hours per day with exercise being allowed only three to four days per

week and only for five to ten minutes on each of those occasions. (35a) The right to a reasonable amount of exercise has been held to rise to constitutional dimensions. Rhem v. Malcolm, 389 F. Supp. 964 amended 396 F. Supp. 1195, affirmed 527 F2d 1041 (S.D. N.Y. 1975).

In U.S. Ex Rel Hoss v. Cuyler, supra, the Courts' refusal to find that Hoss's confinement in administrative segregation was violative of the Eighth Amendment was based upon its finding that the decision of the Defendants to retain the Plaintiff in such confinement was substantially justified. id. at 287. Similarly, in Mims v. Shapp, 457 F. Supp. at 252, the Court noted that it would have ordered the Plaintiff's transfer to other facilities in which he could be released to the general population but declined to do so based upon its finding that no such facilities were available. The clear implication of the reasoning of both

Courts in the above cases is that, absent valid substantive reasons which justify transfers of Pennsylvania prisoners to administrative segregation, such confinement would violate the prisoners' rights to remain free from cruel and unusual punishment under the Eighth Amendment.

Thus, the finding of the Courts in Hoss and Mims, when considered in light of the conditions of Respondent's confinement in the present case, strongly support a conclusion that, under Vitek v. Jones, 445 U.S. 480, Helms' confinement in administrative segregation was not within the normal range of confinement which is intended as a result of his criminal conviction. Judge Luongos' observation in this regard is most enlightening. Noting that, under Ingraham v. Wright, 430 U.S. 651, 664-71 (1977), the fact that Hoss's confinement in segregation was not imposed for punitive reasons does not remove the claim from Eighth Amendment consideration,

id.[6] at 285 n. 12, he specifically found that Hoss's sentence for the murders which he committed did not include confinement in the administrative segregation unit at the prison. id.[7] (See also: Brief for Respondent at pp. 27-32).

6. This is contrary to the argument of Petitioner and the United States that the non-punitive purpose of administrative regregation removes it from Eighth Amendment and due process analysis. (See Brief for Petitioner at 15, Brief for United States at 5).

7. The United States, in its Brief, argues that Respondent could have employed the Pennsylvania inmate complaint system, (See: 37 Pa. Code §95.131 et seq.), in order to contest his treatment in administrative detention. (Brief for United States at 12). However, past experience has shown that the use of the inmate complaint system by prisoners to contest conditions of confinement in administrative or disciplinary segregation has been futile. In Inmates of B Block v. Marks, et al., No. 194 (C.D. 1981), the Commonwealth Court of Pennsylvania reviewed the State's failure to provide segregation inmates at the State Correctional Institution at Huntingdon, Huntingdon, Pennsylvania, with two (2) hours of daily recreation as required by state law. In their complaint, the inmates specifically alleged that the use of

It is clear that Helms' confinement in administrative segregation was not within the normal range of confinement to which he was subjected by means of his conviction. Helms was therefore entitled, under the Due Process Clause itself, re-

the inmate complaint system proved futile. It is also significant that the regulations themselves, at 37 Pa. Code §95.131 (a)(1); (2) provide that the Commissioner or his designee may dismiss or hold in abeyance any complaint which raises an issue currently in litigation in court or which involves subject matter which he deems appropriate for consideration only by a court or other forum. id.

Finally, it is significant that, although authorized to do so under 42 U.S.C. § 1997e, the United States Department of Justice has never certified the Pennsylvania inmate complaint system as adequate to impose an exhaustion requirement upon Pennsylvania state prisoners prior to bringing a civil action under 42 U.S.C. §1983. See: Patsy v. Florida Board of Regents, 50 U.S.L.W. 4731 (1982). Thus, the implication that the inmate complaint system was adequate to protect an inmate in administrative or disciplinary segregation in Pennsylvania is not supported by prior experience nor by any evidence in the record in this case.

gardless of state law, to procedural due process protections prior to his transfer to administrative segregation.

II. THE DUE PROCESS CLAUSE REQUIRES THAT A PRISONER BE PROVIDED WITH A HEARING PRIOR TO TRANSFER TO ADMINISTRATIVE SEGREGATION OR, IF EXIGENT CIRCUMSTANCES EXIST, WITHIN A REASONABLE TIME THEREAFTER HE BE PROVIDED WITH PERIODIC REVIEWS OF HIS STATUS IF HE IS TO BE CONFINED IN SUCH SEGREGATION FOR THIRTY DAYS OR LONGER

The Court of Appeals in the present case held that Helms was entitled to an administrative hearing prior to his detention in administrative segregation or, if exigent circumstances existed, within a reasonable time thereafter. Such hearing must include the elements set forth in Wright v. Enomoto, supra, and Wolff v. McDonnell, supra. Helms v. Hewitt, 655 F2d at 500.

The parties to this litigation agree that due process is a flexible con-

cept, which must be molded to fit the "true place and circumstances" of the situation to which it is being applied. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); Goss v. Lopez, 419 U.S. at 577. It has been recognized that, in order to properly determine what process is due in any given situation, a court must consider the private interest that will be affected, the risk of erroneous deprivation of that interest, and the importance of the governmental interest at stake. Matthews v. Eldrdge, 424 U.S. 319 (1976).

It may fairly be stated that, in the case at bar, the interest of Helms is that of avoiding, or obtaining release from, the harsh conditions of confinement which exist in administrative segregation. Petitioners and the United States argue, contrary to the evidence of record, that Helms interest is slight based upon their

conclusion that there is little difference between the conditions of administrative segregation and confinement in the general population.

Helms' unrebutted affidavit dramatically illustrates the severity of the conditions of his confinement while in administrative segregation vis a vis conditions in the general population. (35a-36a). Helms' assertions in this regard are consistent with the findings of other Courts. In Wojtczak v. Cuyler, 480 F. Supp. 1288 (E.D. Pa. 1979), it was found that the Plaintiff therein, while confined in administrative segregation at a Pennsylvania state prison, was subjected to severe restrictions of his freedom of movement, was not provided with the same cell furnishings, and was not allowed attendance of group religious services, access to the law library, or educational opportunities on the same level as are general population inmates. id. at 1295-96.

The Court in Hoss v. Cuyler, 452 F. Supp. at 283 noted the severe physiological and emotional harm to which an inmate in administrative segregation is subjected. Thus, the inmate's interest in avoiding an erroneous transfer to administrative segregation is great.

Federal Courts in Pennsylvania have also noted the grave risk of error in a decision to transfer a Pennsylvania prisoner to administrative segregation pursuant to BC ADM 801 IV B by Pennsylvania prison officals. In Hoss, supra, the Court noted that the Defendants had failed to state any specific reasons for continuing the Plaintiff's confinement in administrative segregation. Rather, the reviewing committee simply stated, repeatedly, that Hoss's confinement would continue based upon an interview with the inmate or upon their conclusion that he was

a "security risk". id. at 270, finding No. 45; at 272, finding No. 52. Similarly, in Mims the Court found that the Program Review Committee, charged with reviewing Plaintiff's confinement status, consistently ignored evidence of Plaintiff's good behavior while in administrative segregation and relied upon stale information to support its decisions. id. at 250-251. In Drayton v. Robinson, 519 F. Supp. at 553, Judge Muir held that the Plaintiff's rights to procedural and substantive due process had been violated based, in part, upon his finding of the prison officials consistent failure to cite any specific reasons for their decision to retain the Plaintiff in administrative segregation status.

Thus, the experience of the Federal Courts in Pennsylvania, with respect to litigation concerning the confinement of prisoners in administrative segregation

shows that prisoners are exposed to a serious risk of improper solitary confinement.

This risk is exacerbated by the fact that confinement in administrative segregation is indefinite and may last for months or even years. In Mims, supra, the Plaintiff was confined for a period of five years, based upon the crimes for which he was convicted. id. at 249. In Drayton, supra, the Plaintiff was confined for approximately seven months without any adequate explanation of the reasons for such confinement and, indeed, without an adequate basis and fact in accordance with Pennsylvania regulations. id. at 547:553. In Hoss, supra, the Plaintiff's confinement in administrative segregation lasted for over four years.[8]

8. This pattern has also been noted by courts examining the pattern of administrative segregation in other jurisdictions. See: Kelly v. Brewer, 525 F.2d at 396, Wright v. Enomoto, 462 F. Supp. at 403-404.

The interest of the state is that of the security of the institution. See: Bell v. Wolfish, 99 S.Ct. 1861 (1979). The Petitioners claim that the procedures required by the Courts' ruling would impair their ability to act in order to segregate prisoners from the general population where such action is required by security or safety concerns. This contention, however, is not justifiable. The Court of Appeals held that the Respondent was entitled to a hearing prior to his transfer to administrative segregation or, in the existence of exigent circumstances, within a reasonable time thereafter. id. at 500.

Indeed, the fact that Petitioners have already imposed upon themselves the requirement that prisoners be given hearings subsequent to placement in administrative segregation belies their claim that any significant government interest

will be impaired by holding that such hearings are constitutionally required. (See: Brief for Petitioners at 22).

Finally, it is noted that the Court of Appeals made no ruling as to whether, in addition to the procedural protections set forth in Wolff and Wright, the due process clause requires periodic reviews for those prisoners confined in administrative segregation for thirty (30) days or longer. In Wright, supra, the Court recognized the severity of administrative segregation stating:

> The deprivation suffered by a prisoner confined for administrative reasons is greater than that suffered by one confined on a disciplinary charge. The latter is for a definite term, generally for a maximum of ten (10) days. In contrast, administrative segregation is for an indefinite period--the prisoner may be confined for months, even years, without hope of release. The charges at a disciplinary hearing are definite and narrow. The inmate is accused of violating

> a prison rule. In contrast, as is evidenced by the plaintiff's exhibits, the charges at a hearing resulting in administrative confinement tend to be vague and are frequently based on mere rumor, suspicion, or conjecture. In this connection we deem it appropriate to note that these circumstances and issues involved in decisions leading to administrative segregation may well, upon a proper showing, demonstrate the necessity for additional procedures to make hearings adequate. id. 462 F. Supp. at 403-404 (citations omitted).

This reasoning was followed by the Courts in Mims v. Shapp, 457 F. Supp. 247, and Drayton v. Robinson, 519 F. Supp. 545, in which it was held that an inmate is entitled to periodic reviews of his status and to a written statement of the reasons relied upon for continued segregation where such confinement will last for thirty days or longer.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the judgment

of the Court of Appeals be affirmed as modified to reflect that the due process clause itself protects prisoners from arbitrary placement in administrative segregation. The judgment should further be modified to require periodic reviews of the status of a prisoner, such as Helms, who is confined in administrative segregation for prolonged periods of time.

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NO. 81-638
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LOWELL D. HEWITT, SUPERINTENDENT, ET AL.,
PETITIONERS

V.

ARRON HELMS, RESPONDENT

AFFIDAVIT OF TIMELY MAILING

I, Frederick M. Stanczak, Esquire, being duly sworn according to law, hereby depose and state that the following is within my personal knowledge and true and correct to the best of my information and belief.

On July 8, 1982, pursuant to Rule 28.2 of the Rules of the Supreme court of the United States, I placed forty (40) copies of the foregoing Brief for Susquehanna Legal Services as Amicus Curiae in the United States Mail, first

class postage prepaid, and addressed to the Clerk, United States Supreme Court, 1 First Street, N.E., Washington, DC, 20543.

Frederick M. Stanczak

Sworn to and subscribed
before me this _____ day
of July, 1982.

Notary Public

CERTIFICATE OF SERVICE

Frederick M. Stanczak, Esquire, a member of the bar of the Supreme Court of the United States, pursuant to Rule 28.5(b) of the Rules of the Supreme Court of the United States, hereby certifies that he served three (3) true and correct copies of the foregoing Brief for Susquehanna Legal Services, as Amicus Curiae, upon the below listed counsel for Petitioners and Respondent, by placing same in the United States mail, postage prepaid, on this eighth day of July, 1982.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether inmates of the Pennsylvania prison system have a liberty interest in remaining free from administrative detention.

2. Whether, if Pennsylvania's inmates have such a liberty interest, they are due all the process required by *Wolff* v. *McDonnell* in connection with prison disciplinary proceedings.

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INTEREST OF THE UNITED STATES

This case presents the question whether and to what extent a prisoner's transfer from the general prison population to administrative detention implicates the Due Process Clause. The court of appeals held that an inmate of the Pennsylvania state prison system who is subject to such a transfer is entitled to a hearing in accordance with the procedural requirements set forth in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and conducted either prior to the transfer or within at least a few days thereafter.

The regulations of the Bureau of Prisons, like Pennsylvania's regulations, provide for the transfer of inmates from the general prison population to adminis-

trative detention under procedures that, in most instances, are inadequate to satisfy the due process requirements held applicable by the court of appeals. In the Bureau's view, the requirements imposed by the court of appeals are potentially inimical to the safe and efficient operation of federal correctional institutions. Accordingly, the United States' interest in the disposition of the questions presented by this case is substantial.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held, in essence, that the risk of an individual inmate's erroneously being placed in administrative detention is of more consequence than the risk of prison authorities' losing control of the institution. We have a fundamental disagreement with this ranking of values. In our view, once a defendant has been validly convicted and incarcerated, and in the absence of any statute, regulation or rule to the contrary, the question of the security level at which the inmate is to be confined is purely within the discretion of the prison officials.

We are accordingly led to two conclusions: (I) absent a decision by the governing authority to condition administrative detention on the occurrence of specific events, a prisoner has no liberty interest in remaining free from administrative detention; and (II) even assuming an inmate has such a liberty interest, the government's interest in being able to forestall a possible loss of control of the prison facility must be accorded great weight in the determination of what process is due.

I.

A. The procedural protections of the Due Process Clause apply only to governmental action or inaction that deprives or threatens to deprive a person of "liberty" or "property." The inquiry whether a liberty interest is implicated by placement in administrative detention begins with the recognition that a prisoner is not

a member of the general public, but rather an individual who has been convicted of a crime and duly sentenced to suffer a term of incarceration. Unlike the broader liberty of the free member of society, a criminal conviction extinguishes a prisoner's liberty to the extent of "the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum* v. *Fano*, 427 U.S. 215, 225 (1976).

As we show below, a state's implementation of a system of administrative segregation, in and of itself, neither creates nor infringes upon any liberty interest of a prison inmate. Both the purpose of the segregation—institutional security—and the conditions by which it is implemented in the Pennsylvania and federal prison systems (see pages 10-12 and note 3, *infra*) are well within the contemplation of a criminal conviction and sentence. Moreover, the nature of the decision whether to place or maintain a prisoner in administrative detention is such a predictive and subjective one as to preclude an inmate from having a legitimate expectancy in its outcome and to render irrelevant any formal fact-finding procedures. Accordingly, while a state may choose to create a liberty interest in its prisoners not to be placed in administrative detention by conditioning such placement on a finding of particular facts, where the state has not done so, no liberty interest can properly be implied.

B. A liberty interest exists only when a state has bound itself to take, or refrain from taking, specified actions on the basis of determinable, particular findings. When it has done so, the Due Process Clause requires the implementation of procedures designed to reduce to an acceptable level the risk that those findings will not be made fairly and accurately. On the other hand, where the state has not set up rules that make particular decisions turn on particular findings, there can be no legitimate claim of entitlement. In such circumstances, since there are no facts that must be found, there is

no need to invoke due process protections to ensure they are found fairly.

Since Pennsylvania has not made the decision whether to impose or continue administrative detention turn on particularized findings or otherwise evinced an intent to create a liberty interest in inmates not to be confined in administrative detention, the court of appeals erred in implying such a liberty interest. Indeed, the contrast between the broad, generalized language by which the Pennsylvania regulations authorize prison officials to impose administrative detention and the extremely detailed description of the "misconducts" of which an inmate must be convicted before he can be confined in disciplinary segregation makes clear that Pennsylvania intended to create a liberty interest in its prisoners only with respect to the latter type of restrictive confinement.

II.

Assuming arguendo that respondent had a liberty interest in remaining free from administrative detention, the court of appeals nevertheless imposed unduly stringent procedural requirements. The process that is due in connection with a particular type of decision depends on a balancing of the weight of the private interest that will be affected by the official action, the extent to which the use of additional or substitute procedural safeguards would decrease the risk of an erroneous decision, and the substantiality of the government's interest in not providing the additional or substitute procedures.

The logical conclusion of this balancing process is that the procedures that the Court held in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), to be required in prison disciplinary proceedings are not called for in connection with the decision whether to place or maintain an inmate in administrative detention. In view of the less serious deprivations and consequences suffered by the administrative detainee, as compared with an inmate who is found

guilty in prison disciplinary proceedings, the inappropriateness of the *Wolff* v. *McDonnell* fact-finding procedures to the discretionary decision whether to place an inmate in administrative detention, and the substantial governmental interest in maintaining control over the prison facility (an interest that the rest of the inmates largely share), a degree of procedural safeguards less than that required in disciplinary proceedings is warranted here.

ARGUMENT

I. THE DECISION WHETHER TO PLACE OR MAINTAIN RESPONDENT IN ADMINISTRATIVE DETENTION DID NOT IMPLICATE A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE

Administrative detention, as it is implemented both in the Pennsylvania and the federal prison systems, is a means of maintaining institutional security by removing from the general population inmates whose continued presence there is thought to imperil the safety of other inmates, staff members, or the prisoner himself, or to be otherwise inimical to the orderly running of the institution. 37 Pa. Code § 95.107(a)(1); 28 C.F.R. 541.20(a). Unlike disciplinary segregation, administrative segregation is not intended as a punitive measure, and administrative detainees generally retain the rights and privileges accorded to the general inmate population, with the exception principally of those freedoms that are inherently inconsistent with segregation from the general population.[1]

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[1] The conditions prevailing in administrative detention in the Pennsylvania and federal prison systems are discussed in greater detail at pages 10-12 and note 3, *infra*.

A. Except To The Extent That He May Have A Legitimate Claim Of Entitlement Grounded In The Statutes, Regulations, Or Rules Governing The Terms Of His Confinement, A Prisoner Has No Liberty Or Property Interest In Remaining In The General Prison Population

The procedural protections of the Due Process Clause extend only to governmental action or inaction that deprives or threatens to deprive a person of "liberty" or "property." As the Court has explained, "the range of interests protected by procedural due process is not infinite." *Board of Regents* v. *Roth*, 408 U.S. 564, 570 (1972). Particularly with respect to actions affecting prisoners, the Court has stated (*Meachum* v. *Fano*, 427 U.S. 215, 225 (1976); emphasis in original):

> [T]o hold * * * that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.

See also *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976).

The inquiry whether there is a liberty interest in avoiding administrative segregation begins with the recognition that the question involves not the rights of the general public, but rather rights claimed by individuals who have previously, with all due process, been convicted of crimes sufficiently serious to warrant their present incarceration. *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 129 (1977); *Wolff* v. *McDonnell*, 418 U.S. 539, 561 (1974). Such "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). While this is not to say that an inmate retains no constitutionally cognizable liberty interests (*Wolff*, *supra*, 418 U.S. at

555-556), it is firmly established that a criminal conviction extinguishes a prisoner's liberty to the extent of "the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum, supra*, 427 U.S. at 225. Because administrative segregation—in its purpose and the means by which it is implemented in the Pennsylvania and federal prison systems—is within the range of custody authorized by a criminal conviction, a Pennsylvania or federal prisoner can have no legitimate expectation that he will not be transferred from the general prison population to nondisciplinary restrictive custody, any more than that he will not be transferred from a minimum security institution to a more severe and restrictive institution of greater security. Compare *Meachum* v. *Fano, supra*, with *Vitek* v. *Jones*, 445 U.S. 480 (1980).[2]

1. ***Segregation Of An Inmate From The General Prison Population Because He Is Suspected Of Being A Threat To Other Inmates, The Prison Staff, Himself Or The Orderly Running Of The Institution Is Within The Range Of Custody Authorized By A Criminal Conviction And Sentence***

It is inconceivable to us that a criminal sentence would not contemplate that a prison warden has the inherent,

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[2] The per curiam decision in *Hughes* v. *Rowe*, 449 U.S. 5 (1980), does not pretermit this inquiry. In that case, an Illinois state inmate had alleged, *inter alia*, that his due process rights were violated by his placement in segregation, without a prior hearing, pending a disciplinary hearing on a charge of consuming a homemade alcoholic beverage. This Court held, without intimating any view on the merits, that it was error to dismiss the inmate's pro se civil rights complaint for failure to state a claim.

The issue of the existence and source of the prisoner's liberty interest was not analyzed in *Hughes*, and it seems likely that the Court viewed the complaint as sufficient to assert a claim that Hughes was subjected to *punitive* segregation without a prior hearing. Justice White's concurring opinion does identify the due process issue, concluding that the liberty interest flowed from the specifics of the Illinois regulation applicable to that case. 449 U.S. at 16-17.

plenary power to remove from the general prison population to more secure confinement an inmate who he suspects may present a threat to other inmates, staff members, himself or to the orderly functioning of the institution, notwithstanding the absence of any quantifiable proof in support of the warden's suspicion. "Responsible prison officials must be permitted to take reasonable steps to forestall * * * threat[s of violent confrontation and conflagration], and they must be permitted to act before the time when they can compile a dossier on the eve of a riot." *Jones* v. *North Carolina Prisoners' Union*, *supra*, 433 U.S. at 132-133 (footnote omitted).

This Court frequently has recognized that the paramount concern of a correctional system is the safeguarding of internal security. *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979); *Jones* v. *North Carolina Prisoners' Union*, *supra*, 433 U.S. at 132; *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974); *Procunier* v. *Martinez*, 416 U.S. 396, 404 (1974). The indicia of threats to that internal order, however, are frequently highly subjective and subtle. Superficially ambiguous occurrences, "filtered through the experience of the decisionmaker" (*Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 8 (1979)), may well lead to the conclusion that preventive custody is required. "Clustering" of inmates, particularly when a known inmate leader is involved, an increase or decrease in the flow of inmates to food service or recreation areas, an increase or decrease in vandalism, an increase or decrease in rumors, the noise level of inmate groupings—all are examples of observations that may signal to the experienced prison administrator a need for precautionary detention. Events outside the immediate institution also may heighten tension; for example, disturbances in other institutions, reports of mistreatment of inmates elsewhere, or broadcasts that may emphasize inmate-guard, racial or other tensions. Such signals, trivial though they may appear to those who have not worked or lived in prisons, are extremely significant to prison

administrators, who ignore their own intuitive reactions only at great risk to themselves, their staff, other inmates and even, on occasion, the community outside the prison walls.

Not only would it be foolhardy to prohibit prison officials from acting on such signals (so long as they do so in a nonpunitive manner (see part I(A)(2), *infra*), it is also unfair to the rest of the inmates. Because of the sheer physical confines of prison, inmates cannot, as can members of the general public, remove themselves from threatened or actual danger by retreating to the privacy of their homes or businesses and turning a key in a lock. Also, because of the forced proximity and contacts of prison life, anger and resentment that elsewhere might be expected and permitted to dissipate on their own are allowed to do so in the prison atmosphere only at great risk. Administrative detention thus constitutes an important prophylactic measure that can be employed by prison officials in an attempt to anticipate and forestall, or at least to quell, disturbances or violence that otherwise could spread quickly through the volatile, tense and crowded atmosphere of a penal institution. It strains credulity to suggest that such a vital tool in the safeguarding of institutional security would not be anticipated by a criminal conviction and sentence, or that it could not constitutionally be utilized in the absence of some quantum of proof objectively confirming the authorities' judgment or intuition.

2. *The Conditions Of Confinement In Administrative Detention In Both The Pennsylvania And Federal Prison Systems Are Well Within The Contemplation Of A Criminal Conviction And Sentence*

In *Wolff* the Court dealt with the due process requirements attendant upon punishment of inmates for misconduct in the prison. Inherent in this inquiry was the obvious fact that any punishment inflicted was not part

of the original criminal conviction, since it was being imposed exclusively for post-conviction misconduct. In *Vitek* v. *Jones*, where the point was perhaps less self-evident, the Court concluded that a criminal conviction did not bring within its ambit the commitment of the convict to a mental institution. Here, by contrast, the purposes for which administrative segregation is imposed and the nature of the actual conditions to which administrative detainees are subjected in Pennsylvania and the federal system demonstrate that such confinement is well within the contemplation of the original criminal conviction and sentence.

The purpose of administrative segregation is not punishment but the maintenance of institutional security, and the essence of such confinement is isolation from the general population and inability to move about the institution. 37 Pa. Code §§ 95.106(1), 95.107(a)(1); 28 C.F.R. 541.20. Accordingly, the facilities used for segregation are more secure than general population quarters and usually are located in a specially designated area of the institution. 37 Pa. Code §§ 95.106(1), 95.107(a); 28 C.F.R. 541.20. Consistent with the overriding security objective of segregation from the general population, the administrative detainee is confined to his cell except for regular exercise, shower, and visitation periods, and he is deprived of the usual interaction with his fellow prisoners that is provided by shared meals, work and recreation. At the same time, the guiding principle in both prison systems is that administrative detainees are otherwise generally to be afforded the same privileges as are made available to general population inmates (*e.g.*, commissary, visitation, and correspondence privileges). 37 Pa. Code § 95.107(a)(2); 28 C.F.R. 541.21(d).

Indeed, the essential distinction between administrative and disciplinary detention is that in the former, inmates retain as many privileges of general population inmates as are consistent with the requisite degree of

segregation, whereas, in the latter, as many privileges may be withdrawn as is consistent with the Eighth Amendment and requisite standards of human dignity. See 28 C.F.R. 541.19(a) ("Inmates housed in disciplinary segregation have significantly fewer privileges than those housed in administrative detention"); compare 37 Pa. Code § 95.107(a)(2) with 37 Pa. Code § 95.107(b)(2). Even more significant to the "liberty interest" inquiry is the fact that placement in administrative segregation generally does not affect the length of time that an inmate will be incarcerated (see 28 C.F.R. 2.1-2.34) or have any other adverse collateral consequences to him.[3]

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[3] We are informed by counsel for the petitioners that the only effect placement in administrative detention could have on a Pennsylvania prisoner's parole release date would be that if the inmate were actually in detention on his scheduled release date or on the date scheduled for a parole hearing, the release or hearing date might be postponed. In any event, respondent has not claimed that his release date was delayed because of his having been detained in administrative segregation (A. 62a).

The Bureau of Prisons advises us that in the majority of its institutions the cells used for administrative detention are in most respects physically indistinguishable from those in which general population inmates are housed. Federal regulations expressly provide that quarters used for segregation must be "well ventilated, adequately lighted, appropriately heated and maintained in a sanitary condition at all times" (28 C.F.R. 541.19(c)(1)), and that all cells must be equipped with a bed, mattress, blankets and pillow (28 C.F.R. 541.19(c)(3)). Except for emergency situations, the number of inmates confined to a segregation cell may not exceed the number for which the space was designated (28 C.F.R. 541.19(c)(2)).

Although the regulations provide (28 C.F.R. 541.19(a)) that inmates in segregation may be confined either alone or with other inmates, the Bureau advises us that virtually all inmates in administrative segregation are single-celled. The cells in which administrative detainees are placed, however, generally permit them to see and communicate with other inmates or staff who are located in the administrative detention area.

Administrative detainees in the federal prison system, like their counterparts in Pennsylvania, are permitted access to most of their personal property. 37 Pa. Code § 95.107(a)(2); 28 C.F.R. 541.20(d). They also are permitted to wear civilian clothing except in those

These conditions of confinement, we submit, are well within the "normal limits or range of custody" that a criminal conviction authorizes a state to impose.[4] Indeed,

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federal facilities in which all inmates are required to wear institutional garb. Administrative detainees in Pennsylvania are not permitted to wear civilian clothing. 37 Pa. Code § 95.107(a)(2). Nor, under Pennsylvania's published regulations, may they use individual televisions or radios (except, with the express approval of the Program Review Committee, battery-powered radios) (*ibid.*). We understand from petitioners (Pet. Br. App. 47 n.*), however, that under the regulations actually in effect in the Pennsylvania prison system in December 1978 and at the present time administrative detainees are permitted to have individual televisions and radios, with the express approval of the Program Review Committee. "All other personal property which is permitted in general population will be permitted in Administrative Custody" (37 Pa. Code § 95.107(a)(2)). Although, in the past, administrative segregation cells in the federal system were furnished with only a bed, toilet and sink, whereas general population cells contain desks and chairs as well, the Bureau presently is furnishing desks and chairs to administrative detainees in some of its facilities on an experimental basis. We are advised by the Bureau of Prisons that the reason for the more restrictive practice is that, in the past, some administrative detainees have destroyed the furnishings they were given.

[4] In an affidavit filed in support of his motion for summary judgment respondent averred (A. 35a), and petitioners have not challenged, that his "confinement for six months in segregated status" caused him to be deprived of, *inter alia*, his job, access to vocational, educational, recreational, and rehabilitative programs, adequate opportunities to exercise, shower or change clothes, and visiting privileges. Respondent's six-month period of confinement in segregation, of course, refers to the sentence of six months' *disciplinary* segregation that he received as a result of being found guilty on Misconduct No. 90986, which was computed to include the time he already had spent in administrative confinement. Accordingly, we cannot discern whether the conditions described by respondent prevailed during his confinement in administrative segregation, disciplinary segregation, or both. In any event, if respondent's complaint is that he was subjected to the conditions of disciplinary segregation when he should have been treated as an administrative detainee, he could have invoked Pennsylvania's internal inmate complaint review system to challenge the conditions of his confinement (see 37 Pa. Code §§ 95.131 *et seq.*).

if a state were inclined to impose on all of its prisoners the conditions of confinement to which administrative detainees in Pennsylvania and the federal prison system are subject, it would be free to do so. Accordingly, if respondent has a liberty interest in remaining in the general prison population, it must arise from something other than the Due Process Clause itself, namely, from the statutes, regulations or rules governing the terms of his confinement.

3. *The Mere Existence Of An Administrative Detention System Does Not Give Inmates Any Liberty Interest In Remaining Free From Such Detention*

If administrative detention is within the contemplation of a valid criminal conviction and sentence, it naturally follows that an inmate can have no liberty interest in remaining free from such detention. See *Meachum* v. *Fano*, *supra*. Nevertheless, because the mere existence of a system whereby some inmates are treated differently from others has given rise to respondent's claim of a liberty interest in the less restrictive treatment, it is necessary to explain why the implementation of a system of administrative detention, in and of itself, creates no claim of entitlement in an inmate to avoid such detention.

Central to the existence of a liberty interest is the ability to know that certain events will produce certain results (see part I(B)(1), *infra*). As we have shown above (see pages 8-9, *supra*), however, the typical decision whether to impose or maintain administrative detention is not the result of particularized, objective findings. Rather, the outcome turns "on purely subjective evaluations and on predictions of future behavior" (*Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 464 (1981)). Moreover, the types of events that trigger a perceived need for administrative detention are no more

static than they are objective. Events that alone may be viewed as wholly innocuous, in combination with other circumstances may elicit an immediate precautionary response from prison officials. Similarly, events that at one time may have been viewed by the prison administration as harmless commonplaces may, in the light of new or changed circumstances, be thought to call for restrictive custody. Indeed, circumstances of which neither prison officials nor inmates ever conceived suddenly may appear and call for the precaution of administrative detention. In the face of so unbounded a decisionmaking process, it is unrealistic to speak of an inmate's having a legitimate expectancy in its outcome. Hence, unless a governing authority has chosen to abandon the subjective, judgmental model of decisionmaking that is inherent in the nature of administrative detention (see pages 8-9, *supra*) in favor of making the determination whether to place an inmate in administrative detention turn on objective facts, its mere adoption of an administrative detention system will not create in its inmates a liberty interest in remaining free from such detention.

B. Respondent Has No Legitimate Claim Of Entitlement To Remain In The General Prison Population

1. *A Statute, Regulation, Administrative Practice, Contractual Agreement or Other Mutual Understanding Creates a Liberty Interest Only If It Binds the Governing Authority to Take, or Refrain From Taking, Specified Actions on the Basis of Determinable Facts or Particular Findings*

A liberty interest exists only when the state has bound itself to take, or refrain from taking, specified actions on the basis of determinable facts or particular findings. As Justice Brennan stated in his concurring opinion in *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 467 (1981) (emphasis in original), a claimant must show

> that particularized standards or criteria guide the State's decisionmakers. * * * The *structure* of the State's decisionmaking process is thus as significant as the likely *result* of that process. Respondents have not shown that the Board is required to base its decision on objective and defined criteria. * * * Accordingly, I agree that respondents have no protectible liberty interest * * *.

See also *Greenholtz*, *supra*, 442 U.S. at 10; *Meachum*, *supra*, 427 U.S. at 226-227.

So, for example, in *Wolff* the inmates had a statutory right not to have their good-time credits forfeited except for "flagrant or serious misconduct"; the parolee in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), had a statutory right to remain free unless he violated the terms of his parole; and in *Goss* v. *Lopez*, 419 U.S. 565 (1975), the student had a right to attend public school unless he was guilty of misconduct. See also *Vitek* v. *Jones* (state prison inmate has a right not to be transferred to a mental hospital unless he "suffers from a mental disease or defect" that cannot be treated in prison).

On the other hand, where the state has not set up rules that make particular decisions turn on particular findings, there can be no legitimate claim of entitlement. In *Meachum*, for example, in which the state had not conditioned inter-prison transfers on proof of specific events, the inmate had no legitimate entitlement not to be transferred from a medium-security prison to a maximum-security facility. Similarly, in *Dumschat*, in which the Board of Pardons possessed "unfettered discretion" (452 U.S. at 466) to grant commutations of sentences and pardons, the inmate had no legitimate expectation that his life sentence would be commuted, notwithstanding that the Board of Pardons granted approximately three-fourths of the applications for commutation of life sentences that it received.

The teaching of these cases is that where there is no statutory presumption or determinable set of facts that

can give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protections of due process are not implicated. See *Arnett* v. *Kennedy*, 416 U.S. 134, 181 (1974) (White, J., concurring in part and dissenting in part).

2. *Pennsylvania's Regulations Should Not Be Construed to Create a Liberty Interest in Inmates Not to be Placed in Administrative Detention*

A state may, if it chooses, create in its citizens a liberty interest in the outcome of what otherwise would be a subjective, predictive determination. In *Greenholtz* the Court held that because of the "unique structure and language" (442 U.S. at 12) of Nebraska's parole statute, which created an express presumption in favor of early release, Nebraska state prisoners did have a liberty interest in release on parole, notwithstanding the fact that the parole-release decision normally "depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the [Parole] Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release" (*id.* at 10). In so holding, however, the Court emphasized that it was relying on the unusual language and syntax of the Nebraska statute and cautioned that "whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis" (*ibid.*). See also *Anderson* v. *Winsett*, 449 U.S. 1093 (1981) (White, J., dissenting from denial of certiorari).

Here, the court of appeals held (Pet. App. 17a) that Pennsylvania prisoners possess a state-created liberty interest to be free of administrative segregation, derived from certain regulations promulgated by the Bureau of Correction that operate "to limit segregation in Administrative and Disciplinary Custody to particular classes of inmates who meet objective criteria set out in the

rules." In so holding, the court relied (*id.* at 18a-19a & n.7) on regulations permitting transfer from the general population to administrative segregation (1) of an inmate who is alleged to have committed a Class 1 Misconduct, "upon approval of the officer in charge of the institution, not routinely but based upon his assessment of the situation and the need for control" (37 Pa. Code § 95.104(b)(1)); (2) of an inmate in investigative status, "upon approval of the officer in charge of the institution where it has been determined there is a threat of a serious disturbance, or a serious threat to the individual or others" (§ 95.104(b)(3)); and (3) "as may be necessary to maintain security" when state police investigative assistance has been requested (Bureau of Correction Administrative Directive 004, IV.B.1). From these regulatory criteria, the court of appeals reasoned (Pet. App. 17a-20a) that procedural safeguards are necessary to give the inmate an opportunity to show that he is not in fact a security risk.

We submit that this analysis is defective in several significant respects:

First, it is fallacious to respond automatically to the existence of written guidelines for official action by concluding that an entitlement or expectancy has thereby been created. Even where official action is intrinsically subjective, judgmental, or discretionary, it is sound governmental practice to attempt to achieve rationality and consistency of action through the use of written guidelines. The existence of written guidelines of varying degrees of generality or specificity thus does not necessarily evidence a state's decision to condition action on any particular set of objectively verifiable facts; their existence therefore does not in the least prove the creation of a due process liberty interest. Moreover, use of the kind of reasoning employed by the court of appeals may do little more than discourage government agencies from promulgating guidelines to channel official discretion, with a consequent decrease in systematized,

rational, and fair decision-making. Cf. *United States* v. *Caceres*, 440 U.S. 741, 755-756 & n.24 (1979).

Second, where the nature of the challenged official action is such that a rational government might well desire to leave considerable leeway for judgment and "expert intuition" by the responsible official, it is simply not reasonable to presume that the state has created a due process liberty interest in the absence of an expressed or clearly discernible intention to do so.[5]

Third, the close connection between administrative detention and maintenance of prison security should have counseled reticence, not forwardness, in finding a liberty interest. Preservation of institutional security is a matter as to which great deference is paid to the informed judgment of prison officials and in which prison inmates have been given no role to play (see *Meachum* v. *Fano*, *supra*, 427 U.S. at 225). It is probably not reasonable to conclude in the absence of clear evidence that prison officials have fettered the broad discretion they possess in the critical areas of institutional security and internal order (see *Bell* v. *Wolfish*, *supra*; *Jones* v. *North Carolina Prisoners' Union*, *supra*, 433 U.S. at 128; *Pell* v. *Procunier*, *supra*, 417 U.S. at 827) by creating a liberty interest in inmates to remain free from administrative detention.[6]

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[5] Consideration of a state's apparent intent regarding creation of a liberty interest is particularly appropriate because, as the Court has emphasized, an essential attribute of a legitimate claim of entitlement is mutuality of expectation. A liberty interest thus must be based not on a unilateral hope or abstract desire, but on a clearly understood and recognized basis in some rule or law. See *Dumschat*, *supra*, 452 U.S. at 465; cf. *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577.

[6] In this regard, we note that the provisions on which the court of appeals relied as creating a liberty interest in inmates not to be placed or maintained in administrative segregation are not statutes enacted by the Pennsylvania legislature. Rather, the Pennsylvania legislature, like Congress, has furnished broad authority to prison administrators to control and manage the corrections systems. Pa.

Finally, the court of appeals failed to engage in a careful analysis of the language of the Pennsylvania regulations. Such an analysis discloses no intent on the part of the State to create in its inmates a liberty interest in remaining free from administrative detention.

Each of the Pennsylvania regulations on which the court of appeals relied (like those of the Bureau of Prisons, see note 7, *infra*), contains two distinct components. One component involves obvious facts, on which a hearing would serve no purpose, such as whether a charge of Class 1 Misconduct had been issued against the inmate, whether the inmate was under investigation, or whether investigative assistance had been requested from the state police (see page 17, *supra*). The second component recites a purely discretionary determinant—whether there is a need for control, a threat of a serious disturbance, or a special necessity to maintain security (*ibid.*). Each factor of the second type reflects the fact, discussed above (pages 8-9, *supra*), that in the typical administrative detention situation the administrator's choice of a course of action turns "on purely subjective evaluations and on predictions of future behavior * * *" (*Dumschat, supra*, 452 U.S. at 464).

To be sure, in *Meachum* and *Dumschat* there was nothing in written form to guide the exercise of official discretion, whereas Pennsylvania has promulgated regulations addressing administrative detention. The regulations, however, do no more than restate the obvious—that the general purpose of administrative segregation is to maintain the security of the institution and those living and working within it. See 37 Pa. Code §§ 95.104 (b)(1), (3), (4), 95.107(a)(1); 28 C.F.R. 541.20(a). They do not purport to limit the broad discretion inherent in such general language. Cf. *Ex parte Secombe*, 60 U.S. (19 How.) 9, 14 (1856), cited in *Arnett* v. *Kennedy, supra*, 416 U.S. at 181 (White, J., concurring in

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Stat. Ann. tit. 71, § 301 (Purdon Supp. 1981); see also 18 U.S.C. 4042(1). The prison administrators themselves, in turn, have promulgated the regulations at issue.

part and dissenting in part). Indeed, what the court of appeals referred to as "objective criteria" and "specifications" (Pet. App. 17a) with respect to administrative detention are not substantially more detailed than what this Court identified as the standard underlying interprison transfer decisions in *Meachum* (427 U.S. at 225): "what would best serve institutional security or the safety and welfare of the inmate."

The court of appeals thus erroneously lumped together the regulations governing disciplinary detention and those dealing with administrative detention (Pet. App. 17a), thereby ignoring the substantial and illuminating differences between them. By contrast to the extremely detailed list of "misconducts" of which an inmate must be convicted before he can be subjected to disciplinary detention (37 Pa. Code § 95.102a), the regulations provide only the broadest, most generalized classification of inmates who may be administratively detained (37 Pa. Code §§ 95.104(b)(1), (3), (4)). Nor do the Pennsylvania regulations contain the "shall * * * unless" phraseology on which this Court relied so heavily in *Greenholtz*. While the fact that the regulations permit the imposition of administrative segregation under some broadly described conditions conceivably could be interpreted as prohibiting prison officials from employing administrative detention in totally different circumstances from those specified (but see *Bishop* v. *Wood*, 426 U.S. 341, 344-347 (1976)), certainly there is in the regulations no express presumption in favor of an inmate's remaining in the general prison population comparable to that which the Court found determinative in *Greenholtz*. Moreover, in contrast to the Pennsylvania regulations, the statute at issue in *Greenholtz* contained 13 additional objective factors that the Parole Board was required to take into account in its decisionmaking (442 U.S. at 16-17).[7]

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[7] The regulations of the federal Bureau of Prisons concerning the transfer of inmates to administrative detention are, of course, not

In finding a liberty interest in respondent not to be confined in administrative detention, the court of appeals relied heavily (Pet. App. 15a-20a) on *Wright* v. *Enomoto*,

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directly in issue in this case. The Bureau advises us that, in adopting its regulations on the subject, it did not intend to create or understand that it was creating any expectation on the part of federal prisoners that they would not be subjected to administrative detention except upon the finding of any particular set of objective facts. Rather, the Bureau intended merely to provide guidelines to which prison administrators would resort in exercising their judgment as to the appropriateness of placing inmates in administrative detention. In light of the decision of the court of appeals in this case, however, the Bureau is reviewing its current regulations to determine whether they should be amended to make more clear the intention not to create any liberty interest. Although such revisions may be a wise precaution to insure that its regulations are not misconstrued, we note our view that the current regulations create no liberty interest giving rise to procedural due process rights.

Under 28 C.F.R. 541.20(a)(1)-(4), an inmate may be transferred from the general prison population to administrative detention when the inmate's

> continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate:
>
> (1) [i]s pending a hearing for a violation of institution regulations;
>
> (2) [i]s pending investigation of a violation of institution regulations;
>
> (3) [i]s pending investigation or trial for a criminal act; [or]
>
> (4) [i]s pending transfer * * *.

In our view, the introductory language quoted above, like the second set of factors contained in Pennsylvania's regulations (see pages 17, 19, *supra*), vests sufficient discretion in the prison authorities to preclude any legitimate claim of entitlement by an inmate not be placed in administrative detention. As for the four numbered factors, they, like the first set of factors in the state regulations (*ibid.*), present "questions susceptible of demonstrable proof on which evidence is not likely to be overlooked * * *." *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 170-171 (1951). Accordingly, the federal regulations cannot reasonably be construed to create a liberty interest.

462 F. Supp. 397 (N.D. Cal. 1976), aff'd, 434 U.S. 1052 (1978), in which a three-judge district court construed a similar California regulation as creating such a liberty interest, and this Court summarily affirmed.[8] *Wright*, however, should not control this case.

As the Court subsequently emphasized in *Greenholtz* (442 U.S. at 12), the *intent* behind each state enactment is a controlling factor, and "whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." Accordingly, the district court's construction of the California regulation in *Wright* cannot be applied wholesale to the Pennsylvania regulations here. Indeed, doing so would be particularly inappropriate because, as we showed above (page 20, *supra*), the difference between the Pennsylvania regulatory scheme's treatment of, on the one hand, disciplinary detention and, on the other hand, administrative detention, suggests an intent to create a liberty interest only in freedom from the former, whereas the California regulation in *Wright* deals with both types of detention in the same manner (see note 8, *supra*).

Moreover, we note that summary affirmances "have considerably less precedential value than an opinion on the merits." *Illinois Elections Board* v. *Socialist Workers Party*, 440 U.S. 173, 180-181 (1979); *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). Of particular relevance to the present case is this Court's admonition in *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) that "[s]ummary actions, * * * including [summary affirmances], should

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[8] The California regulation at issue in *Wright* provided (462 F. Supp. at 403; emphasis by the court):

> General Policy. (a) Inmates must be segregated from others when it is *reasonably* believed that they are a menace to themselves and others or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons. *The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken.*

not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." The finding of a liberty interest in a prisoner to remain free from administrative detention clearly would constitute "breaking new ground." Moreover, since the summary affirmance in *Wright*, the Court has issued several full opinions dealing with the creation vel non of liberty and property interests.[9] Accordingly, we suggest that the Court put *Wright* to one side and consider the question whether a prisoner has a liberty interest in remaining free from administrative detention on a clean slate.[10]

II. ASSUMING SOME PROCESS IS DUE, THE COURT OF APPEALS REQUIRED TOO MUCH

Having found a liberty interest in the Pennsylvania regulations, the court of appeals went on to hold (Pet. App. 25a) that the "basic procedures" due an inmate

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[9] See, *e.g.*, *Connecticut Board of Pardons* v. *Dumschat*, *supra*; *Greenholtz* v. *Nebraska Penal Inmates*, *supra*.

[10] Furthermore, an examination of the factual situation in *Wright* suggests that the three-judge court's finding of a liberty interest in that case, with concomitant due process requirements, was apparently prompted by the particular abusive practices presented by the record of that case, which the district court identified at length (462 F. Supp. at 399-401). From 47 affidavits filed by inmates in support of their motion for summary judgment, it appeared that prisoners in the California prison system often were transferred to maximum security segregation and left there for extended periods in obvious violation of state regulations (because of the ground on which the court of appeals disposed of this case, it did not reach respondent's contention that petitioners had violated their own regulations; Pet. App. 7a n.5). In the federal system, at least, a claim that prison officials were acting in violation of their own regulations presumably could be brought under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* and 701 *et seq.*, which authorizes judicial review and invalidation of agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See *United States* v. *Caceres*, *supra*, 440 U.S. at 753-754. The Bureau of Prisons has been held to be an agency within the meaning of the APA. See *Ramer* v. *Saxbe*, 522 F.2d 695, 697, 700 n.6 (D.C. Cir. 1975).

detained in administrative custody are at least "the same [as those] prescribed for disciplinary proceedings in *Wolff* v. *McDonnell*." Those procedures include advance written notice of the claimed violation, an opportunity for the inmate to call witnesses and present documentary evidence in his defense "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals," and a written statement of the fact-finders as to the evidence relied upon and the reasons for the disciplinary action taken (418 U.S. at 563-566).[11]

Because it was unclear from the record exactly what process had been afforded respondent, the court of appeals remanded the case for a determination whether the December 8 proceeding satisfied the requirements of *Wolff*. If the Court should disagree with our primary submission—that respondent's placement in administrative detention implicated no liberty interest—then of course some process was due respondent in connection with his placement in administrative detention. In our view, however, due process requirements would be satisfied by procedures less elaborate than required by *Wolff*.

It is by now "axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'" *Greenholtz*, *supra*, 442 U.S. at

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[11] At one point in its opinion (Pet. App. 26a) the court of appeals suggested that the *Wolff*-type proceeding must be held "either before the [administrative] confinement or, in exigent circumstances, within a reasonable period thereafter" and even indicated (Pet. App. 24a-26a) that in most cases a "reasonable time" would not exceed 72 hours. Elsewhere the court noted (Pet. App. 26a n.11), however, that because the Pennsylvania prison system "contemplate[s] administrative placement primarily as a preventive measure," there is no constitutional impediment to immediate confinement in restrictive custody, "regardless of the existence of a 'continuing emergency' like a prolonged riot," so long as notice and hearing are afforded "within a reasonable period thereafter." Moreover, with specific regard to respondent, the court indicated (Pet. App. 27a-28a) that a proceeding that was held on December 8, 1978—five days after his initial confinement in administrative detention—would have been timely provided it met the requirements of *Wolff*.

12, quoting *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 481. More precisely, this Court has held (*Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The Court has recognized, however, that the context of the prison environment calls for a gloss to be placed on the usual balancing analysis (*Wolff*, *supra*, 418 U.S. at 560):

> [I]t is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.

Thus aware of the unique constraints of the prison setting (*id.* at 561-563), the Court in *Wolff* dispensed with some features that one normally might expect in a proceeding designed to ascertain whether an individual shall be punished—rights of confrontation, cross-examination, and counsel—on the ground that these procedures could pose too great a hazard to institutional interests and present more practical problems than their usefulness would warrant (*id.* at 567-570). As we show below, assuming that a prisoner has a liberty interest in remaining free from administrative detention, application of the *Mathews* v. *Eldridge* three-part test reveals the need for a still different type of process.

A. *Mathews* v. *Eldridge* first directs a consideration of the private interest that will be affected by the official action. While we have no doubt that most inmates would prefer to remain in the general population, the extent of the deprivation entailed in administrative segregation is considerably less than that which results from disciplinary proceedings and, moreover, must be viewed in the context of the already seriously truncated liberty of the inmate in the general prison population.

In *Wolff* (418 U.S. at 560-561), the Court contrasted the forfeiture by a prison inmate of good-time credits with the loss of "conditional liberty" that is suffered by a parolee whose parole has been revoked. The Court recognized (*id.* at 561) that "deprivation of good time is unquestionably a matter of considerable importance." Nevertheless, because the loss of good time credits does not usually result in the immediate enlargement of the inmate's sentence, or even always result in its extension (see note 12, *infra*) whereas "revocation proceedings determine whether the parolee will be free or in prison" (418 U.S. at 560), the Court concluded (*id.* at 561) that the revocation decision was of greater magnitude and, hence, deserving of greater procedural protection.

In turn, while the forfeiture of good time may extend the period of incarceration an inmate must suffer,[12] placement in administrative segregation generally does not have this or other adverse or stigmatizing collateral consequences for him (see page 11 and note 3, *supra*). Moreover, as we have shown above, administrative detention, unlike disciplinary detention, is neither punitive in design nor necessarily perceived by the inmate as punitive. Additionally, it does not entail the same degree of lost privileges and freedoms as accompanies disciplinary segregation (see pages 10-12, *supra*). Accordingly, con-

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[12] In the federal prison system, forfeited good time may be restored by the Attorney General "as he deems proper upon recommendation of the Director of the Bureau of Prisons." 18 U.S.C. 4166.

sideration of the first *Mathews* v. *Eldridge* factor supports the conclusion that fewer procedural safeguards are required in connection with placement in administrative detention than in disciplinary proceedings.

B. The next factor to be considered is "the fairness and reliability of the existing * * * procedures, and the probable value, if any, of additional procedural safeguards. Central to [such an] evaluation * * * is the nature of the relevant inquiry." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 343. As we have shown (see pages 8-9, *supra*), the primary inquiry here is not, as it is in prison disciplinary or parole revocation proceedings, whether determinable, historical facts have occurred, but rather the likelihood that certain events will occur in the future. Accordingly, here as in *Greenholtz*, "[p]rocedures designed to elicit specific facts, such as those required in * * * *Wolff*, are not necessarily appropriate * * *" (442 U.S. at 14).

In *Greenholtz*, the Court held (442 U.S. at 15) that the Nebraska Parole Board could deny an inmate early release on the basis of its examination of the inmate's file and a personal interview of him.[13] "Since the [early release] decision is one that must be made largely on the basis of the inmate's files, this procedure adequately safeguards against serious risks of error and thus satisfies due process" (*ibid.*; footnote omitted).

Analogously, the risk of an inmate's erroneously being placed in administrative detention would not be significantly decreased by the application of the *Wolff* fact-finding procedures. The question whether a given inmate's continued presence in the general population presents a threat to institutional security is not amenable

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[13] The potential parolees in *Greenholtz* also were entitled to present letters and statements on their behalf to the Parole Board, while the administrative detainees in the federal system have no corresponding right to offer documentary evidence. In *Greenholtz*, however, the state system already provided that procedural right; this Court did not have to decide whether it was required as a constitutional matter (442 U.S. at 4).

to resolution by the testimony of an inmate's proffered witnesses. That one or more of the institution's inhabitants may not consider the inmate a threat to the general security does not disprove the existence of such a threat. Moreover, in the tense, volatile prison atmosphere, the truth of the officials' suspicions may not even be relevant; the mere fact of the suspicion or rumor itself may be sufficient to trigger preemptive action, retaliation or other security-threatening, escalatory responses by other inmates. The possibility that in some few instances an inmate's witnesses might be able to prove that his continued administrative detention is not warranted does not detract from the fact that, in the majority of cases, the question whether there is a threat to the security of some aspect of the institution will not be resolved by the testimony of witnesses called by an inmate. "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 344. See also *Greenholtz*, *supra*, 442 U.S. at 14.[14]

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[14] The final due process element required in *Wolff*—a written statement by the factfinders of the evidence relied on and the reasons for the action taken (418 U.S. at 564-565)—also contemplates a fact-finding procedure. In the federal system, as in *Greenholtz*, (442 U.S. at 4-5), while the decisionmakers state the reasons for the result reached, they do not state the "evidence" on which they based their decision (28 C.F.R. 541.20(c)). It suffices to say that we, like the Court in *Greenholtz* (442 U.S. at 15), "find nothing in the due process concepts as they have thus far evolved that requires the [reviewing authority] to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for [release into the general prison population]."

In addition, one reason given by the Court in *Wolff* (418 U.S. at 564, quoting *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 489) for requiring a " 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action" was to protect the inmate from "collateral consequences based on a misunderstanding of the nature of the original proceeding" (*id.* at 565). This concern, however, is inapposite to the present context. Because

Wolff itself set no limit on the time within which disciplinary proceedings must be held.[15] Moreover, while in *Hughes* v. *Rowe*, *supra*, 449 U.S. at 11 (emphasis added), the Court stated that the "[s]egregation of a prisoner without a prior hearing may violate due process *if the postponement of procedural protections is not justified by apprehended emergency conditions*," even the court below recognized (Pet. App. 26a n.11) that because the Pennsylvania prison system "contemplate[s] administrative placement primarily as a preventive measure," there is no constitutional impediment to immediate confinement in restrictive custody "regardless of the existence of a 'continuing emergency' like a prolonged riot" so long as notice and hearing are afforded "within a reasonable time thereafter." In our view, the predictive, subjective nature of the inquiry whether to place or maintain an inmate in administrative detention is not amenable to an unduly short "speedy trial" requirement. To the contrary, the designedly deliberative, multi-faceted decisionmaking process might be hindered, rather than enhanced, by a time limit shorter than the seven-day period within which federal regulations require that a first in-person review be held.

Indeed, we submit that in the administrative detention context the periodic review system already employed by the Bureau of Prisons may be more appropriate than the single, more formal procedure of *Wolff*.[16] Under the Bureau's regulations (28 C.F.R. 541.20(c)), every in-

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the use of administrative detention, at least in Pennsylvania and the federal prison system, is explicitly limited to a security precaution, it cannot provide the basis for subsequent collateral, adverse action against an inmate (see page 11, *supra*).

[15] Because the disciplinary sanction involved in *Wolff* was the forfeiture of good time credits, the Court had no occasion in that case to decide whether a *prior* hearing was required.

[16] The first *Wolff* requirement—advance written notice—already is required by the federal regulations "provided institutional security is not compromised thereby." 28 C.F.R. 541.20(b).

mate who spends seven continuous days in administrative detention is afforded an in-person status review to determine whether he should remain in such confinement.[17] After an inmate's first in-person review, he is afforded a record review (at which he does not appear) every seven days and further in-person reviews at least every 30 days. In connection with each of the 30-day in-person reviews, the staff conducts a psychiatric or psychological assessment of the inmate, which is submitted to the reviewing authority in a written report "address[ing] the inmate's adjustment to his surroundings and the threat the inmate poses to self, staff and other inmates." [18] Since the imposition of administrative segregation generally is a response to a particular confluence of circumstances occurring in a prison at a given time, fairness and effectiveness would seem to be best served by reassessments of the situation at regular intervals to assure that an inmate is released from the restrictive confinement as soon as the "reasons for placement cease to exist." 28 C.F.R. 541.20(c).

C. The final factor to be considered is the nature of the governmental interest—here, the prison authorities' interest in maintaining prison security. See *Bell* v. *Wolfish*, *supra*, 441 U.S. at 547; *Jones* v. *North Carolina Prisoners' Union*, *supra*, 433 U.S. at 132; *Pell* v. *Procunier*, *supra*, 417 U.S. at 823; *Procunier* v. *Martinez*, *supra*, 416 U.S. at 404. In this connection, an argument that

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[17] Although the inmate's right to make a statement disputing the grounds for his continued confinement in administrative detention is implicit in the requirement that he be afforded periodic personal interviews, one purpose of the current review of the Bureau of Prisons' regulations (see note 7, *supra*) is to consider whether there is a need to make that right explicit.

[18] As noted above (see note 14, *supra*), after each in-person review, the inmate is entitled to receive a written copy of the staff's decision and its reasons therefor. 28 C.F.R. 541.20(c). The standard administrative review procedure also is available to an inmate claiming improper confinement in administrative detention. 28 C.F.R. 541.10 *et seq.*

the Court identified but found inapposite in the context of parole revocation (*Morrissey* v. *Brewer*, *supra*, 408 U.S. at 483) is pertinent here: "that summary treatment [may be] necessary * * * with respect to controlling a large group of potentially disruptive prisoners in actual custody." As we stated at the outset, it is inconceivable to us that a prison warden would not have inherent, plenary power to remove from the general prison population an inmate who he considered to be a threat to other inmates, to staff members, to himself, or to the orderly running of the institution. It is this interest in being able to forestall a feared instance of loss of control, with all of its consequences, that must be balanced against the individual inmate's interest in remaining free from the conditions of administrative detention.

Moreover, this "governmental" interest in maintaining security is not that of prison authorities alone. It is shared by large numbers of other inmates, as well as by the prison staff, most of whom wish to live and work in as secure an environment as prison officials can provide. See R. Korn & L. McCorkle, *Criminology and Penology* 474-475 (1959).

The inevitable conclusion of this balancing process is, we submit, that the procedures required by *Wolff* are not necessary or appropriate in connection with the decision whether to impose or maintain administrative detention. In view of the less serious deprivations and consequences for the inmate of administrative detention, as compared with the results of guilt in prison disciplinary proceedings, the inappropriateness of many of the *Wolff* procedures to the nature of the decision being made here, and the fact that the government's important interest in maintaining control of the institution, which is largely shared by the rest of the inmates, is implicated, it is reasonable to conclude that a lesser degree of procedural safeguards is warranted here. We submit that the procedures already afforded by the Bureau of Prisons are consistent with the nature of the decision to be made and adequately protect the relevant interests.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Docket Sheet

NO. 81-638-CFX	TITLE Lowell D. HEWITT, et al., Petitioners v. Aaron Helms

DOCKETED	COURT
Sept. 24, 1931	United States Court of Appeals for the Third Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Gregory R. Neuhauser, LeRoy S. Zimmerman
	Counsel for Respondent: Richard G. Fishman
Sept. 24, 1981	Petition for writ of certiorari filed. (Record filed)
Oct. 26, 1981	Motion of respondent for leave to proceed in forma pauperis; and brief in opposition filed.
Oct. 28, 1981	DISTRIBUTED. 11-13.
Nov. 2, 1981	Memorandum for the U. S. as amicus curiae filed. (D).
Nov. 20, 1981	REDISTRIBUTED. 11-25.
Dec. 1, 1981	REDISTRIBUTED. 12-4.
Jan. 4, 1982	REDISTRIBUTED. 1-8.
Feb. 8, 1982	REDISTRIBUTED. 2-19.
Feb. 23, 1982	REDISTRIBUTED. 2-26.
Mar. 2, 1982	REDISTRIBUTED. 3-5.
March 8, 1982	The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.

Apr. 14, 1982	Order extending time to file the petitioners' brief on the merits until May 22, 1982.
Apr. 20, 1982	Joint appendix filed.
May 24, 1982	Brief for the petitioners filed.
June 3, 1982	Brief for the U. S. as Amicus Curiae supporting reversal filed.
June 3, 1982	Application for leave to file a brief as amicus curiae on the merits in excess of page limitations, and order granting same by Brennan, J., 6/3/82, not to exceed 32 pages.
June 9, 1982	Order extending time to file the respondent's brief on the merits until July 8, 1982.
July 8, 1982	Brief of respondent filed.
July 9, 1982	Brief, amicus curaie, for Susquehanna Legal Services filed.
July 8, 1982	Brief, amicus curiae, for The State Bar of Michigan, Prisons and Corrections Committee filed.
Sept. 3, 1982	CIRCULATED.
Nov. 8, 1982	ARGUED.